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THE LAW OF WILLS



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THE
LAW OF WILLS

FOR STUDENTS

BY
MELVILLE MADISON BIGELOW
PH.D. HARVARD

BOSTON
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1898

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PREFACE.

WHEN asked some time ago to write a book on Wills for the Students' Series, I told my publishers, who are owners of the American copyright of Jarman on Wills, under the International Copyright Law, that I would try it if I could have free use of Jarman and my own notes to that work. How much the permission given has been used, the references to Jarman, scattered up and down the present volume, in part bear witness.

But a word or two need now be said. This book agrees with those who find an important place for legal theory in education for the bar. Chapter I., largely on the theory of wills in relation to the State, and Chapter XIV., largely on the theory of construction, are only more express examples, because of their relative and intrinsic importance, of what more or less runs through the book. Whatever mode of instruction is pursued, whether the Harvard, which is powerfully modifying where it is not taking the place of other methods, or any other, the doctrines of the law should, I think, be taught in direct connection with and in the light of legal theory. This book

is written in great part to enforce, and in some small way to illustrate, that idea. The purpose of the book is not merely to teach certain rules and doctrines of law, but, still more, to show in and through them the theory and spirit of the law as the very life of the State, and so to help on good citizenship.

The law of wills will be found strong meat for the student, however it may be put before him. But all endeavor to aid the diligent has here been made. The divisions of the subject are, it is hoped, of a nature to be helpful; they are strongly marked, and urged, when necessary, upon the student's attention. And while the general subject runs on in a continuous stream, side notes have been supplied as often as any turn of thought or particular illustration suggested. The student may thereby inform himself beforehand, if he will, of what is going forward in the text.

M. M. B.

Boston, January 1, 1898.

NOTE.

The references to Jarman are uniformly to the star paging of the last edition (Boston : Little, Brown, & Co., 1893).

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PART I.

INTRODUCTION.

THE LAW OF WILLS.

CHAPTER I.

THEORY OF POST-MORTEM DISPOSITION: THE STATE: RISE OF WILL-MAKING.

As the first step to any stable theory of the post-mortem disposition of property, whether by testacy or by intestacy, it must be observed that the idea of absolute-property-forever in any particular owner, as in the case of an estate to a man and his heirs forever, is a fiction, — a useful fiction probably, but still a fiction. A grant to a man and his heirs forever is a grant to such grantee forever; the 'heirs' have nothing in the estate granted. The grant, therefore, is to the grantee as if he might live forever, which in this world is impossible. There can be no such thing, then, as absolute property forever, in the true sense of the term.

Fiction of having property forever.

It is no answer to say that a man may be considered to live in his posterity, or even, to put the case still stronger, that a man holds his posterity in his loins; for either form of statement is as much a fiction as the one first mentioned. The childless man is conclusive of the point. Nor is it an answer to say that the owner of property may sell or exchange it for things consumable (if it be not consumable itself), and then consume the substitute; for in the case in hand the property, whether consumable or not, has not been consumed. Though it

or some substitute might have been used up, as a matter of fact it has been left, and is now to be disposed of at death. The answer supposed confuses the notion of 'absolute' property, or one's *power* over things, with the duration of such power. As a mere matter of power, a man may certainly own property 'absolutely.'

Considered, however, as a theory, as it must be, how is the theory of ownership forever to be worked out?

The fiction as theory. With cases of testacy there would be no difficulty; the testator is dealing with his own, and acting in person. In cases of intestacy the theory can be worked out only upon the idea of an implied agency in the State; the State acting for the owner in case of his failure to dispose of the property. But it is plain that such an agency must stand upon a footing wholly unique and unlike any other. In the first place, the supposed agency would be confined, as a matter of fact at least, to giving; it would not extend to selling or otherwise contracting. In the second place, the supposed agency would go into operation where recognized agency ends, with the death of the principal. And in the third place the agency would be irrevocable. Agency cannot be stretched to such a point. And the same will be found true of any other term that may be used to do duty for the idea of acting for one who is defunct.

On what support, then, can a stable theory of post-mortem disposition be placed? Discordant answers have been suggested.

One answer is, that the title to property, subject to life ownership in a grantee, is in the State, and, but Theory of State ownership. for the fact that the State has thought best to allow such grantee to designate the course of the property after his death, it would always

revert to the State upon the death of the grantee. This view of the case, it may be noticed, has nothing to do with original ownership in the State, except inferentially; it proceeds upon the notion that the State has some sort of reversionary right upon the death of its grantee-in-fee and of each of his successors in ownership, because in the nature of things no man can hold property forever. The theory of perpetual ownership collapses the moment it is put to the test, according to this view. I hold to myself and my heirs forever, the grant declares; but after my death the property becomes the State's, though the State allows me, by some sort of agency, to dispose of it. That fact, however, has no bearing upon the soundness of the theory of State ownership.

What, then, are the facts upon which this last-named theory rests or derives support? And how does the theory work out its result? These questions in order.

Intestate laws strike one first. The State regulates the disposition of property at the death of the owner if the owner fails to dispose of it. And it ^{Intestate laws.} may be noticed that the owner may so fail, not merely by making no attempt, but by making an attempt that does not conform to law. How, it might be urged, can the State interfere in such a way except upon the footing of ownership? The act of disposition is an act of dominion. If the State does not become owner at the time of the State's action, then the State cannot give the property, except by an exercise of arbitrary power, which means robbery. Again, if the State does not acquire ownership at the death of the grantee, who does? Not, ordinarily, the next of kin, in the case of personalty; in most cases¹ the State hands the property over

¹ Where, in the absence of debts against the estate, the property is found, after the late owner's death, in the hands of one who would be

to the executor or administrator. Not the heir, it might be said, even in the case of realty; the State hands the property over to him.¹ The State so hands the property over, even against specific legatees or devisees, though there is no reason in the nature of things why the legatees or devisees might not take directly, subject to the claims of creditors.

Another fact which may be deemed to support the idea of State ownership is connected with what is called
 Title by occu- title by occupancy. The taking of really
 pancy. vacant property would seem to give to the
 taker ownership by natural right. But we are told that
 'this right of occupancy, so far as it concerns real
 property . . . hath been confined by the laws of England
 within a very narrow compass.'² It seems to have been
 allowed in real property, even at the first, in but a single
 case, namely, in an estate for the life of another ('*pur
 autre vie*'), the tenant dying during the lifetime of that
 other person ('*cestui que vie*'). In such an event any
 one might enter upon the land and hold it during the
 unexpired period of the estate, that is, until the death of
cestui que vie. But this right was reduced almost to
 nothing in the seventeenth century, by statute. That is,
 according to the view of State ownership, the State acted
 upon the principle or belief that the ownership had never

entitled to it, one need not take out letters of administration in order to acquire title. That is probably the effect, directly or indirectly, of statutes.

¹ The State, however, hands the property over to the executor, administrator, or heir, as representing the deceased; hence the State cannot be said to act as owner in the transaction, except in so far as interfering may be considered an act of dominion, and so of ownership; with which point compare the law of trover. The suggestion as to the heir is pure assumption.

² Blackstone, ii. 257.

been vacant; the entry of the new occupant was by mere permission, which the State now withdrew.

A more particular case looking, it may be thought, towards State ownership may be brought forward. Statutes exist touching any right of adopted children to inherit property of their parents by blood. Whether such children can so inherit ^{Adopted children's inheritance.} is determined by statute; the State, it may accordingly be supposed, gives or withholds. To the suggestion that adopted children have no 'natural' right to the property of a deceased parent-by-blood, the answer has been given from the bench that the suggestion is idle, 'for the reason that the statutory right is perfect and complete;' heirship being 'not a natural, but a statutory right.' Hence the State may increase the number of a man's heirs, and cut down the shares of the others accordingly.¹

These are a few out of many like instances that might be mentioned; but all may be comprehended in the statement that both intestate and testate disposition of property is a matter of statute, in ^{Summary of theory of State ownership.} other words, of regulation by the State.² The State, it may therefore be thought, must be the

¹ *Wagner v. Wagner*, 50 Iowa, 532; *Abbott's Cases*, p. 123.

² Taxation of inheritances, whether through testacy or intestacy, far from pointing to State ownership, as some would have it, is a denial of State ownership. Taxation imports that the State does not own the thing taxed; the State does not tax its own. If the State merely professed to relinquish to heirs all but a certain proportion of the estate, that would imply that the legislature considered that the State owned the property; but that is not what the State does. Inheritance rates are based on the ground that as the heirs, legatees, or devisees come to the estate without cost or labor, and hence do nothing by way of earning it, it may properly be made a subject of special taxation. Whether that is sound theory or not, it has nothing to do with State

owner; and besides, the State lives or may live forever, or, at any rate, it is expected to outlive the life of individuals, and therefore fulfils by possibility the requisite duration. And the State's grantee and his successors have permission or appointment, so the argument would run, to act instead of or for the State in disposing of property to pass at their death. We have, then, according to this theory, State ownership, with agency in the holder, as a supplementary theory by which disposition post-mortem is worked out. Can this doctrine be put aside?

The question may be answered indirectly in the course of propounding another, and what appears to be the true, theory of law; which may be put thus: In the case of intestacy, the State acts as an intermediary, in behalf of the public welfare. If no provision for the disposition of the property were made, the property at the death of the owner would become vacant, and a scramble would be invited, — the wrong-doer's opportunity. To prevent the property becoming vacant, the intestate, accepting a virtual offer by the State to act upon certain established terms, to wit, the intestacy statutes, — for in effect these are only an offer, — commits or leaves the property to the State, to distribute it upon those terms.¹

ownership of the property. The State might on the same ground tax gifts inter vivos, if it were practicable. Nor does it make any difference how far the inheritance rates go, even if to the point of confiscation; it is still taxation.

¹ 'Occupancy,' says Blackstone, ii. 257, 'is the taking possession of those things which before belonged to nobody. This . . . is the true ground . . . of all property. . . . But when once it was agreed that everything capable of ownership should have an owner, natural reason suggested that he who could first declare his intention of appropriating anything to his own use, and . . . actually took it into possession, should

In this view the intestate has a well-founded belief that the disposition which the State proposes is just and may save trouble, and possibly embarrassment and failure; and experience shows that in point of fact this is true in most cases, where attention has been called to the matter at all.

In the case of testacy it would seem at first that a theory actually prevails that the testator, in disposing of property owned by him absolutely, is disposing of his own, as much as when he gives or sells to take effect in his lifetime.¹ But looking below the surface, this may, after all, be con-

Testacy :
distinction be-
tween owner-
ship and title.

thereby gain the absolute property of it; . . . *quod nullius est, id ratione naturali occupanti conceditur.*'

Speaking of estates *pur autre vie*, Fry, J., says that when such an estate 'is given to a man, or to him and his heirs, the most he can take is an estate for his own life, and any one who comes in after him takes, not through him, but as occupant of the estate. Originally any one who pleased was allowed to scramble for the occupancy after the death of the first taker, but this was found to be so inconvenient that he was allowed to appoint by will a special occupant. But still every one who came in after the first taker, came in as an occupant, and not as deriving title through him.' *In re Barber*, 18 Ch. D. 624, 627.

This fairly represents the state of things which the laws in general concerning post-mortem disposition of property are intended to prevent.

¹ Where it only carries out, or professes to carry out, the intention of the testator, the State, needless to say, is not acting upon any theory of State ownership; and that too, though it may be deemed necessary, upon one ground or another, to presume or to impute an intention in the testator. And yet some cases really of this kind may at first have the appearance of interference by the State on grounds of ownership. Thus, as will be seen in another chapter, where a testator makes a devise or legacy to his son John, and John dies before the death of his father, leaving issue who survive the testator, the issue (under statutes) take, if not excluded by the will, the gift intended for the father, though issue may not have been in the mind of the testator. But this, after all, is nothing more than an attempt to carry out in some sort the testator's intention; for the law proceeds upon the theory that, as the tes-

sidered as merely concealing a distinction between ownership and title. The idea of testate disposition, when closely examined, appears to be no more than this, that whatever may be true of ownership in the sense of holding and enjoying, a person's *title* may run on after the death of the person having it, wherever the grant or devise is to him and his heirs. Title accordingly means authority to dispose of; in that sense obviously title may be severed from ownership, and indeed have no connection with it.

It may be objected that this is using the word title in a sense out of the ordinary, and making it do duty for an idea foreign to it. But that is not true, as appears from the legal phrase 'right and title to convey;' at any rate, the word is easily capable of the meaning given to it; and when understood accordingly it is consistent with the fact that ownership, in the sense of having and controlling in the name of ownership, comes to an end with the owner's death, even though he holds 'to himself and his heirs forever.'

That fact should be emphasized; one's ownership or *having* necessarily comes to an end with death. What
 Vacancy: would then happen but for a power of dis-
 scrambling. position resting somewhere, where it could
 and ordinarily would be exercised so as to preserve and
 help on the social instinct which seeks to draw men
 together in the State — that has already been suggested.
 The property would become vacant, and, according to
 its value, a thing to be scrambled for. Society, the
 very purpose and product of the social instinct, would

tator gave the particular interest to his son John, he did not intend that interest to go to his other legatees or devisees, and that he would probably have given it, in case of John's death, to John's issue rather than have it go elsewhere.

be pulled apart upon the death of the first man having property worth a scramble. To prevent such a catastrophe the absolute owner has 'title' or authority to make a will, as the one most likely to act in accord with the social instinct; and in event of his failure to act, the State exercises the authority.

Thus disposition by testacy and disposition by intestacy stand upon the same footing and are expressions of the same deep purpose, to wit, the prevention of a vacancy and the failure of what is the very foundation of society and order, the social instinct. They do not express any theory of State or individual ownership of property-forever. The individual in the case of testacy, the State in the case of intestacy, is an intermediary.

If still the question is raised, from what source emanates the authority which confers ownership upon devisee, legatee, or distributee, the answer is, the social instinct.¹ The power of disposition is conferred upon the owner or upon the State; it does not emanate from either. Nor does it emanate from the social instinct as fictitious owner of the property; the power is the expression of the social instinct as a social and political necessity. Ownership is not a necessary condition to conferring ownership.² To maintain the social order, power or authority, without being synonymous with robbery or injustice, may act and confer ownership. So it does act, it is conceived, in the matter of post-mortem disposal of property.

¹ There lies the very source of law; law is only the drawing and keeping men together in society, — the fulfilling of the social instinct.

² That was a 'marvellous thing' in the fifteenth century; when it was first seen that a mere direction to an executor to sell lands, which belonged by descent to the heir, could when acted upon by sale confer ownership. It was drawing 'fire from a flint when there was no fire in the flint.' Year Book, 9 Hen. VI. 24 b. But it is no marvel now.

It does not make against this theory that in early times, among our Germanic ancestors, property always fell to heirs after the tenant's death; that is, that a property owner could not make a will having any force or effect in regard to the descent of the property. For, to put the case in the usual way, the property belonged to the family, as a sort of corporation; while the family continued, the community had nothing in the property. It is a different way of putting it, but it is probably true, also, to say, that the property fell from father to child rather than, through a vacancy, to the man who could first lay his hands upon it. It was better that the late tenant's kin should have it; and the only interest the community had in the matter was to see that the kin did have it. That interest on the part of the community was, however, the interest of self-preservation; not to regard it would be to invite anarchy to tear society to pieces.

It is obvious that the same was true in feudal England, when the right to make wills, admitted and practised of goods and chattels, was cut off in respect of land.¹ Except as original source of right, with right of escheat on failure of heirs, the State was not deemed owner, resuming its own upon the death of the tenant and then making a gift of the property to the next taker. It acted then as before, and as at the present time, as an intermediary, to see that the social fabric should not perish. The transfer made was a

¹ Wills of land were in use in England before the Norman conquest (A.D. 1066). How general the use is not known, especially among the smaller free tenants. It is very doubtful whether there was freedom in will-making among such persons, however it may have been with great people. See Pollock & Maitland's *Hist. Eng. Law*, ii. 318.

transfer by rightful authority or power, not the gift of an owner.¹

Such appears to be the actual theory of the law. Still it is probably true, as has already been observed, that in the earlier period of the races which later became English, wills were not in use. The appearance of wills in the Germanic codes (the *Leges Barbarorum*) of a later time, was due to contact with Roman jurisprudence, and was borrowed from that source of civilization.² In the earlier period A's cattle, upon A's death, regularly passed to A's heirs, if he had any; A could not prevent it.³ This fact directly raises another sort of question which the theory above presented naturally suggests, namely; intestate disposition being the rule, how did disposition by will come about? *Whence* it came has already been noticed; it was the gift of Rome's expiring civilization

Wills in Germanic codes: how wills began.

¹ The State is of course the ultimate heir, but only upon failure of all the natural heirs. That very remote claim alone remains in the State after its grant to the grantee and his heirs forever. The State has by such a conveyance parted with its title completely, so that there is nothing for it upon the mere death of its grantee. It does not follow that, because the grantee cannot, as a matter of fact, have the property forever, the State comes in at his death, then giving as it will. The case in very substance is this, to put it once more: The grantee takes for himself, till death, with power of distribution at will of the post-mortem interest; if he fails to exercise the power, the State exercises it, i. e., the *power*, under fixed limitations, subject to its right of taxation upon inheritances.

² See Maine, *Ancient Law*, p. 189. But see additional note at end of this chapter.

³ 'When the phenomena of primitive societies emerge into light, it seems impossible to dispute a proposition which the jurists of the seventeenth century considered doubtful, that intestate inheritance is a more ancient institution than testamentary succession.' Maine, *Ancient Law*, c. 6, p. 189; Abbott, p. 19.

to Rome's rude conquerors, awakened, at last, by closer contact with that civilization, to a better life.¹ But *how* did the making of wills come to be allowed? Equality, at least among male children, and indeed among daughters in the absence of sons, was the inveterate principle of the Germans in their original abodes north and east of the then conquering eagles of Rome.² Wills necessarily implied inequality.

The process by which wills, such as they were, came to be recognized appears to have been as follows:³ The earliest lawful wills of our Germanic ancestors were based, it seems, (1) upon failure of kindred near enough, that is, within the family, to take by the regular method, intestacy; or they were (2) gifts of property to which such kindred had no direct claim. To find the evidence for the first of these cases would take us too far afield into early Germanic usage; for evidence of the second it is not necessary to go back to the earlier home of the English people. It is still true many centuries after the migration, in Norman England. Lands acquired by inheritance as family domain were considered more or less like entailed property, that is, property in which the 'heir' had a legal interest in the lifetime of the tenant,

¹ As to the 'wills' in the Germanic codes, 'they are almost certainly Roman. The most penetrating German criticism has recently been directed to these *leges barbarorum*, the great object of investigation being to detach those portions of each system which formed the customs of the tribe in its original home from the adventitious ingredients which were borrowed from the laws of the Romans. In the course of this process one result has invariably disclosed itself, that the ancient nucleus of the code contains no trace of a will. Whatever testamentary law exists has been taken from Roman jurisprudence.' Maine, *ut supra*.

² Preserved in Kent in gavelkind, well called the common law of Kent.

³ See Sir H. S. Maine, in the 6th chapter of his *Ancient Law*; also *Abbott's Cases*, pp. 19 et seq., where Maine is quoted at length.

so that the heir's consent was necessary to any transfer even *inter vivos*.¹

The words of inheritance in our modern deeds, 'to A and his heirs,'² were, in their Latin form 'et suis hæredibus,' first brought into use in Eng- Words of land in the twelfth or late in the eleventh inheritance. century, following upon the establishment, effected towards the close of the eleventh century, of the (English) feudal tenures, in the case of feoffments or gifts of fiefs or feuds by lord to tenant. At the same time, it may be noticed, in immediate connection with these words of inheritance, reciprocal words declaring that the fief or feud was to be held of the feoffor, 'and his heirs' were introduced into the (oral or written) conveyance. The feoffment contemplated a relation forever between the donor and descendants and the donee and descendants.

In the times referred to, the 'heir,' as we have said, deemed himself in some sort included in the original gift of the lord, either as quasi tenant in tail (to use a term of later times), or as having some other interest of which he ought not to be deprived without his consent.³ In other words, the heir considered that he took, in modern phrase, by purchase. But the case was different in regard to lands which the ancestor had himself added to his estates by acquisition of his own.⁴ With property

¹ It is possible, though but barely possible, that there still survived a notion of the family as a corporation.

² The author is now using a note of his own to the 5th Am. ed. by him of Jarman on Wills, ii. 332.

³ Compare additional note at end of this chapter, as to Greek wills.

⁴ In the Customal known as the Laws of Henry the First, a book of the first half of the twelfth century, it is said that one who has book-land (land of inheritance conveyed by writing) from his 'parentes' should not convey it away from his family. Henry I., c. 70, § 21;

so acquired the right of will-making, in some sort, in regard to land, practically begins.

Testamentary disposition of personalty was everywhere much earlier; though in western Europe not without important limitations. In the latter part of the thirteenth century Glanvill tells us that a man's goods were to be divided into three equal parts: one for his heir, another for his widow, the

Wills of personalty.

Placita Anglo-Normannica, Introd. 44, 45, note. In the reign of the same king (1100-1135) a son confirms, or rather makes anew, a gift of land made by his father to the church, which had been adjudged good against the son. Placita Anglo-Norm. 128, 129. See also Hist. Mon. Abingdon, ii., 136, anno 1104. About the year 1160 the Abbot of Abingdon sues a tenant named Pain 'cum filio quem hæredem habuit' to recover fiefs forfeited, as alleged, by the father. Pain 'et filius suus' entered into a concord with the abbot and so terminated the suit. These were cases of gifts to the donee and his heirs.

Writing some twenty-five years later, Glanvill says that a man may make a 'will' in his last sickness, 'with the consent of his heir;' that he cannot 'without his heir's consent' give any part of his inheritance to a younger son; and that he cannot disinherit 'his son and heir,' even as to land which he (the father) has bought, though if he have no heir of his body, he may do as he will with such land. But he may convey a reasonable part of purchased property without consent of his bodily heir. Lib. 7, c. 1. As to this early 'will,' see Pollock and Maitland's Hist. of the English Law, ii. 321-326.

This special relation of the heir to his father's fief did not long survive the twelfth century, though traces of it appear in Bracton, who wrote in the reign of Henry the Third. See lib. 2, c. 6, fol. 17 b. The word 'assigns,' — to the feoffee, 'his heirs and assigns,' — which greatly helped alienation, was introduced into the feudal gift early in the thirteenth or late in the twelfth century. For a short time in the middle of the thirteenth century the word 'legatees' was added, the gift being to the feoffee, his heirs, assigns, and legatees. Pollock and Maitland, ii. 26, referring to various cartularies, and to one instance in the time of King John, Rotuli Cart. 160. But the word disappeared in the reign of Edward the First, and so the attempt to create a testamentary power failed. P. & M. ii. 27.

third to be at his own disposal.¹ If he died without a wife, he might dispose of one-half, the other half going to his children if any; if he had no children, his wife, if he had a wife, was to have half; and if he died without wife or children, he might dispose of the whole.² Subject to differences of local custom, this continued to be true until the time of Charles the Second.³ By this time personalty might be disposed of by will freely in the greater part of England,⁴ the claims of the widow hav-

¹ Glanvill, lib. 7, c. 5. See also, some fifteen years earlier, the Constitutions of Cashel, c. 6, A. D. 1272, by which English law was to be introduced into Ireland. 'That every good Christian, being sick and weak, shall solemnly make his last will and testament in the presence of his confessor and friends, and that, if he have any wife and children, all his movable goods (his debts and servants' wages being first paid) shall be divided into three parts, one of which he shall bequeath to his children, another to his lawful wife, and the third to such uses as he shall declare. And if it shall happen that there be no lawful child or children, then his goods shall be equally divided between his wife and legatees. And if his wife die before him, then his goods shall be divided into two parts, of which the children shall take one and his legatees the other.' Giraldus Cambrensis, *Conquest of Ireland*, lib. 1, c. xxxiv.

It will be noticed that we have the word 'children' here (as entitled to one part of the goods), where Glanville says 'heir,' by which was meant eldest son. With the Constitutions of Cashel agree *Magna Charta* of John (A. D. 1216), c. 26, of Henry III., 1216, c. 21, 1217, c. 22, 1224, c. 18; Bracton, 60 b. (temp. Henry III.); Fleta, lib. 2, c. 57, § 10 (temp. Edward I.); and *Regiam Majestatem*, lib. 2, c. 37 (the Scotch Glanvill). Compare also *Assize of Northampton*, c. 14 (1176), as to free-tenant socmen. And earlier see *Charter of Henry I.* c. 7 (1101). This casts a doubt upon the text of Glanvill. Is it likely that primogeniture made such a great advance as that indicated by Glanvill, within a few years, and then, within another short time, fell back to its old position? The eldest son's heirship itself (that is, in descent of lands) had not become complete when Glanvill wrote (1187). Lib. 7, c. 3. Nor in the middle of the next century. Bracton, 76.

² See *Constitutions of Cashel*, supra; Blackstone, ii. 491.

³ Blackstone, ii. 491, 492.

⁴ The older usage of the common law, in favor of the widow and

ing continued, however, after those of the children had disappeared.¹

The rise of primogeniture under feudalism in the middle ages appears to have created the occasion and demand for testamentary disposition. Originally, that is, before the fall of the Roman empire, children among the German races, as we have seen, took equally; primogeniture, which of course destroyed all equality, was a thing of slow and gradual growth, beginning here and there with the feudal tie among the conquerors of Rome, and finally spreading over Europe; though not without admitting in various places some different custom, such as junior right, the converse of primogeniture, equally fatal to the idea of equality among the children.² And now 'as the feudal law of land practically disinherited all the children in favor of one, the equal distribution even of those sorts of property which [still] might have been equally divided ceased to be viewed as a duty.'³ And the way to carry out the owner's wishes, as a practical matter of method, was pointed out by Roman jurisprudence and usage. The clergy produced the Roman will, and used it as a model for the purpose in hand. The will has accordingly been called 'an accidental fruit of feudalism.'⁴

children, prevailed longer in Wales, in the Province of York, and in London. Id.

¹ Maine, *Ancient Law*, c. 7, p. 217; Abbott, p. 26.

² As 'borough English,' junior right — the inheritance of the youngest son to the exclusion of his elder brothers — was common local custom in England. On the name 'borough English' see Pollock and Maitland's *Hist. of English Law*, ii. 277.

³ Maine, c. 7, p. 217.

⁴ Id. For the history of the stages through which the English will passed, see Pollock and Maitland's *Hist. of the English Law*, ii. 312-353. Here we are only speaking of what led to will-making.

It should be added that primogeniture did not come into operation in England until after the Norman conquest.¹ On the continent, however, it had taken root much earlier; hence it is necessary to turn to the continent, as we have done, to find the evidence for the statement that testamentary disposition was due to primogeniture.²

Having now pointed out the origin of wills, a distinction should be noticed in the theory, or more properly in the very doctrine, of wills, between testamentary or intestate disposition of personalty and testamentary disposition of realty. The distinction is between taking under representation and taking under conveyance. An executor represents the testator; a legal or fictitious as distinguished from natural or true personality being assumed to exist in the executor and to continue until the duties committed to him have been performed. The legatee takes accordingly from a representative, or by 'succession,' to use a term of the Roman law. And the same is true of distributees in intestacy; they take from the administrator as representative.

Disposition of personalty distinguished from disposition of realty: conveyance.

In the case of realty, however, the devisee takes, by common-law doctrine, as by a conveyance from the testator, though the 'conveyance' takes effect, of course,

¹ And not at once then. See *supra*, note; Charter of Henry I. c. 7 (1101); Assize of Northampton, c. 4 (1176); Glanvill, lib. 7, c. 3 (1187); Bracton, 76 (temp. Henry III.).

² Wills still appear to have a close connection in England with the position of the eldest son. It is stated that wills are frequently used there to aid or imitate that preference for the eldest son and his line which is a general feature in marriage settlements of land. Maine, *ut supra*. For the process and stages by which primogeniture came about, the reader is referred to the passages in the chapter in Maine's *Ancient Law* above cited, and to the extracts from the same in Abbott's Cases, pp. 26-28.

only from the death of the testator, on the probate of the will. This operation of wills of realty will come out more clearly in the next chapter, where the testator will be seen in early times conveying his lands to another to uses such as he (the testator) may then or afterwards designate by will. But the full significance of this distinction will only appear in a later chapter; for the present it is enough to say that, at common law, devises are in certain respects governed by rules akin to those relating to conveyances *inter vivos*.¹

¹ All this is consistent with the theory of wills above presented as the 'true' one; for, breaking through mere form and looking at the substance of things, as one may here do, it is still true that in the case of testacy the testator, in the case of intestacy the State, is but an intermediary, acting for the common weal. The text at this point only shows how the mediation operates. There is nothing in the way the mediation works, to affect the theory.

The Roman will has been referred to in the text as affording a precedent of the will of our early ancestors. It must not be inferred that the Roman will was the only true will, in the sense of will-making without consent of the heir. Even the fact that the ordinary Athenian will was imperfect in the same sense (that consent of heirs was necessary where they were affected) would not justify the inference that the Roman will alone was perfect. Sir Henry Maine appears to have been misled by the tempting inference. *Ancient Law*, pp. 194-196. Some very interesting discoveries in a region of the Nile called the Fayyum, above Cairo, to the west of the river, show Greek mercenaries making their wills (if the instruments are what they strongly appear to be) with perfect freedom. A number of testamentary papyri, more or less complete, were recently found in the district named, in none of which is there any suggestion of restraint upon the testator.

And these instruments are drawn up in one and the same form, indicating that they were in the legal style. Professor Mahaffy, writing upon them, December 8, 1890, speaks of them as the 'sheets of a Probate Court at Arsinoë . . . drawn up in parallel columns.' Whether the sheets are official copies of public records, as Professor Mahaffy thinks, or are only the rough originals, — for they contain many corrections and interlineations, — is not clear; but they were public docu-

ments in either case. The king and queen are in many cases appointed executors; which Professor Mahaffy thinks would make it necessary to have an official copy in the public records.

It will be of interest to notice the common formulæ of these instruments. They begin with —

The date, which in these instances runs from the 10th to the 22d year of the third Ptolemy, i.e., from 237 to 225 B. C. Next, —

The preamble with description of the testator, which runs thus: 'Being of sound mind and good understanding, A, son of B, made the following bequest,' then adding his age, country, stature, and other things relating to his physical person (such as his moles and scars), and his regiment. The words 'being of sound mind and good understanding' will be noted as the words of our own wills. Next, —

The opening language of gift, much the same in each case, but with some variation. Next, —

The details of the gift, embracing the legatees or devisees. Next, —

The appointment of the king and queen and their descendants as executors, which suggests State administration, but nothing more. Next and last, —

The naming and description of the witnesses, generally as many as six, but usually as many as possible, says the orator Isaeus, as quoted by Mahaffy.

Such is the form of the will of the Greek troops of the Fayyum, Egypt; and as the soldiers, says Professor Mahaffy, came from all parts of the Greek world, 'we may fairly suppose that it represents what was in use elsewhere at an earlier period.' Mahaffy, *On the Flinders Petrie Papyri*, Antotypes i.-xxx., Dublin, Academy House, 1891. See also, for further facts, Hermann's *Alterthümer*, and Smith's *Antiquities*. Isaeus says that the Greek wills, of citizens at home presumably, close with solemn imprecations against those who would oppose them. The same thing is common in the Anglo-Saxon and earlier Anglo-Norman wills, — a fact worthy of notice; but there is no such thing in the Fayyum wills. On the subject of these wills see an interesting article in the *Law Quarterly Rev.* for January, 1892, by E. P. Fry, 'Conveyancing under the Ptolemies.'

If the learned reader will look into the works of Diogenes Laertius he will find the wills in full of Aristotle and Epicurus. The will of Epicurus, it may be noticed by the way, is particularly interesting as creating a perpetuity in his garden in the interest of his school of philosophy. For the reference to these wills the author is indebted to Lord Justice Fry. See *Diog. Laert. lib. v. §§ 12 et seq.*, ed. Meibomii, pp. 274 et seq. for will of Aristotle; *id. lib. x., §§ 16 et seq.*, ed. Meib.,

pp. 611 et seq., for will of Epicurus. In Hermann's collection, above cited, will also be found the will of Epicurus. For purpose of comparison Professor Mahaffy, *ut supra*, gives the Greek will of Epicteta of Thera, in the 3d century B. C. The bequests there made are 'with consent of my natural heirs,' as in Anglo-Saxon and Norman wills. See ante, pp. 14, 15. Further light may be looked for from discoveries made about a year ago at Oxyrhynchus, in the Libyan desert of Egypt, one hundred and twenty miles south of Cairo. Here have been found more than four hundred fragments of papyri, containing (besides the Logia of Jesus) various documents, including, it is said, wills. A third of these are retained by the Egyptian government; the rest have gone to the British Museum.

For the early history of the English will, the pages of Pollock and Maitland's *History of the English Law*, it need scarcely be repeated, must be examined.

CHAPTER II.

WILLS SINCE THE NORMAN CONQUEST.

BEFORE the Norman Conquest the right to dispose of property, whether personal or real, by will or act more or less testamentary in the modern sense,¹ was, as we have seen, in use to some extent. Upon the establishment of the form of feudalism which was developed in England soon after the Conquest, the making of wills of land gradually, and by the reign of Edward the First finally,² came to an end, though wills of personalty continued in use. Feudal tenure and the requirement of livery of seisin ultimately made wills of land impossible, according to the common law of England, except in the case of royalty,³ and of deep-seated custom in certain

Before the Conquest: establishment of English feudalism.

¹ On the pre-Norman and early Norman 'wills,' see Pollock and Maitland's *Hist. of English Law*, ii. 312-353.

² After the Statute de Donis, 13 Edw. I. c. 1 (A. D. 1285), wills as well as conveyances of lands held by a man to himself and the heirs of his body became unlawful; but wills of all freehold lands were by this time already a thing of the past, except by local custom. See Pollock and Maitland, ii. 27, 327; ante, p. 12, note.

³ See some of the wills of the Norman kings, in Nicholas, *Royal Wills*. The substance of one of them, by William the Conqueror, is put into English verse by Robert of Gloucester, lines 7826-7831 (Wright's ed. of the longer Chronicle bearing Robert of Gloucester's name, which Wright dates about the year 1300; the original being probably of the time of Henry the First, 1100-1135). In point of disposition, this is a case of real will-making, for the king sets aside his eldest son Robert, and to his second son

'Willam the rede al engeland'

parts of England (as in London) where feudal tenure obtained only in modified form. Freehold estates could not be conveyed, according to the feudal common law except by livery of seisin, that is, by actual, open, notorious delivery of the land, as it were, out of hand.¹ No publicity of making a 'will,' in itself, satisfied the law.²

But the rise and establishment of the Court of Chancery as a court of equity jurisdiction had by the fifteenth century quite undermined the feudal inhibition of wills of realty, and wills of lands were now as common as wills of personalty.

This result had been brought about in this way: The freehold owner enfeoffed another, that is, conveyed to him by livery of seisin, to hold the land to the use of the feoffor³ and to such special uses as the feoffor might then or afterwards designate, as, for instance, by will; then by will, sooner or later, the feoffor would designate

he 'bequeathed;' while

'Normandie is eritage he zef is eldoste sone
Robert the courtehesse.'

To Henry, the youngest, afterwards Henry the First, he 'biqueth is tresour;' and 'he nadde sones nammo' — he had no more sons. The tale is authentic.

¹ 'By the common law of this realm, lands, tenements, and hereditaments be not devisable by testament, nor ought to be transferred from one to another, but by solemn livery and seisin,' etc. Statute of Uses (A. D. 1535), *infra*.

² Livery of seisin sometimes took place or had taken place already. The 'will' in such a case could hardly have been anything more than a sort of confirmation of the livery, or vice versa. See Pollock and Maitland's Hist. ii. 327. Such, or such-like, were indeed most of the ordinary so-called 'wills' of land of Norman England. Livery of seisin was not yet to be superseded.

³ The conveyance being without consideration, the use would result to the feoffor without any declaration to that effect, unless a different intent were shown.

the uses. The feoffee would now hold the legal estate, for the estate had been made to him conformably to the feudal common law; but the chancellor, acting in equity, considered that the declaration to uses, subject to which the feoffee had taken, was binding, and accordingly the feoffee must carry out any special designation of uses thereafter to be made, which of course would include the declaration of his last will. The feoffee to uses would thus be bound to allow the devisee under the feoffor's will to have the benefits conferred by the devise.

One or two illustrations of the time will serve to make a clear picture of the transaction. In the year 1417-18, Thomas, Duke of Clarence, second son of Henry the Fourth, made his will. Towards the end of it he declares (in Anglo-French): 'We wish and ordain . . . that our feoffees of our castles, manors, services, lands, and tenements aforesaid make an estate to Margaret, our very dear wife, in the said castles, manors, services, lands, and tenements, and their appurtenances for the term of her life; the remainder . . . to Henry, our son, Earl of Somerset, and his heirs male of his body begotten.'¹

In the same year King Henry the Fifth, in making his will, declared: 'For as much as before this time I have enfeffed symplech [simply] and without condicion Henry erchibishop of Canterbury [and others named] in the castil and lordship of Hegham Ferrers, and in other lordships, manoirs, lands, tenementz, and othir possessions; . . . that of all the said castils, lordships, monoirs, lands, tenementz, rents, services, and othir possessions, they will do fulfille my will and entent aftir writen; but if it so befallle that or [before] I passe out of this world I change this will . . . I wol and pray the foresaid feffez

¹ Royal Wills, Nicholas, 234.

that thai do fulfille my latter will, the which thai may be certifiēt of be my lettre subscribed with myn owen hand, and enseelet with my seel.' ¹ Then follow the directions to the feoffees.

The most picturesque example of the kind is found in a case of the time of Henry the Sixth, anno 1437. The record of this case tells us that certain feoffees to uses appeared before the chancellor, and on examination declared that their feoffor, 'leyng in an house of his awen . . . so sore seke in his bedde that . . . he myght noght be remeved, in to so moche that in the same nyght followyng he died, callede to hym the foresaide John and Thomas [feoffees], sayng to thaym in this maner: "Sirs ye be the men in whome I have grete trust afore moche other persones, and in especial that suche will als [as] I shall declare you atte this tyme, for my full and last will, shall through your gude help by oure Lordes mercy be perfourmed; Wherefore I late you have full knowlich, that this house which I ly in, and all myn other londes and tenements in this toun, I yeve and graunte to you, to holde to you your heires and your assignes, to this entent, that after myn deces, ze shall make estate of the same house, londes and tenements to Alice my wyfe terme of hir lyve, so that after hir deth thay remayne to Margarete my doghter, and to the heires of hir body loufully becomyng, and if sche die withoute heir of hir body comyng, that then thay remayne to my right heires for evermore. And to thentent that this my last will mowe be performed by you, als my trust is that it shall be, her [here] atte this tyme I delyver you posession of this house in the name of all my londes and tenements afore especified,² als holy and entierly als they

¹ Royal Wills, 236.

² A typical example of livery of seisin, all parties being present on the land.

wer ever myn atte any tyme." By force wherof the forseide John and Thomas wer possesseyd of the house, londes and tenements aforeseide, in thaire demesne als of fee, and of the same house, londes and tenements made estate to the saide Alice, after the deth of hir saide husbond, accordyng to the entent and will afore declared.' ¹

The common-law judges, while not recognizing the position of the devisee, and still holding that wills of realty were contrary to English law, could do nothing, or at any rate did nothing, against cestui que use, as the devisee was called, to prevent him from enjoying the benefits of the will. There was nothing for the common-law judges to lay hold of; the conveyance had been made in accordance with the common-law requirement of livery of seisin, and the title so made continued, throughout the operation of the will, where it had been put.

The common-law courts silent.

On the other hand, the common-law judges would do nothing for cestui que use; they would not in any way, by direct mandate or through damages for breach of trust, compel the feoffee to carry out the terms of the devise. His direction and his undertaking to do so were, in the eye of the common law, secret; that is, they were expressed only by word of mouth or by writing, not by open livery of seisin or acknowledgment in court,² which alone the common law took notice of.

¹ Digby, Hist. Real Prop. 261; Calendars in Chancery, ii. p. xliii. The earliest case known appears to be of the sixth year of Richard the Second (1382-3). *Rothanhale v. Wythingham*, Digby, 249; Calendars, ii. p. iii. This was a petition to compel feoffees to carry out the dispositions of the feoffor's settlement (declared by separate deed) and his son's will.

² By fine or common recovery, the judicial equivalent of livery of seisin.

This is clearly brought out in a case of the time of Edward the Fourth.¹ The plaintiff had brought trespass quare clausum fregit; the plea to which was, that the defendant had entered under a feoffment made by him to the plaintiff, 'to the use of the defendant and upon confidence, and then the defendant, by sufferance of the plaintiff,' entered the land. The plea was held bad. It would be a defence in chancery, said the court, for there a man should have remedy according to conscience, upon the *intent* of such a feoffment; 'but here by the course of the common law . . . it is otherwise . . .; and the feoffor shall not justify contrary to his own feoffment, that the said feoffment was made in confidence.' And this would of course apply to cestui que use as well. The intent, the trust and confidence, were not things open and notorious, known to the neighborhood, so as to enable a jury to pass upon the question.²

But the chancellor, able to look beyond the forms of the common law, took notice of the 'secret' intent (which as a matter of fact was not secret), and, as

The chancellor enforces the use. we have seen, enforced the trust, or use, as it was then called. Thus, with other like influences at work, feudalism was far gone in the fifteenth century. Feoffment to uses had cut the nerve of tenure; the feudal lord had lost his revenues; he could not enforce his right to forfeitures, escheats, wardships, marriages, and the like, — not against the feoffor because he had parted with the title to the lands in question; not against the feoffee to uses, for he virtually had nothing

¹ Year Book, 4 Edw. IV. 8, 9; Digby, Hist. Real Prop. 262 (1464).

² Jenney for the plaintiff put the point plainly. 'A man,' said he, 'should plead such matter as is or may be known to the jury, if the issue should be taken thereon. And this cannot be upon the alleged sufferance.' He added that the defendant ought to have pleaded a lease.

in the lands; not against cestui que use, for no feudal tie bound him to the injured lord.

Finally Parliament made a vigorous effort to save what was left of feudalism, and in the year 1535 passed the Statute of Uses.¹ This statute began by reciting that whereas lands were not devis-
Statue of Uses.
able or transferrible except by livery of seisin, 'yet . . . subtle inventions and practices have been used whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances, craftily made to secret² uses, intents, and trusts, and also by wills and testaments sometime made by nude parolz and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have scantly had any good memory or remembrance; at which times they, being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances;³ by reason whereof' heirs have been unjustly disinherited, lords have lost their wardships, marriages, reliefs, heriots, escheats, and aids for making their sons knights and for marrying their daughters, and (among other enumerated evils) purchasers of lands could hardly be assured of their rights. For remedy whereof it was enacted in effect, so far as need be stated here, that from the first day of May, 1536, conveyances by seisin to uses should be treated as conveyances to the person who was to be entitled to the use of the estate.

¹ 27 Hen. VIII. c. 10.

² The will, not being a matter of record, was considered a secret instrument; so, for the same reason, was the deed of bargain and sale, the grant, and other assurances without livery.

³ By declaring now the uses to which their feoffees are to hold.

The feoffee to uses accordingly took no estate whatever, the seisin which he received reverting by law to the feoffor, because of the use reserved to him. No such feoffment, nor any other kind of conveyance to the use of him who made it, could come to anything; the whole thing, with the trusts imposed, will and all, would be as if nothing had been done. Thus the only way which had been discovered for disposing of land by will was closed up.

So matters stood for five years, by which time Parliament found it impossible to put a stop to the practice of disposing of lands by will, or at least
 Statute of Wills. found it useless to resist a demand which went up from all sides of the kingdom for allowing wills of the kind. In the year 1540 the Statute of Wills was passed,¹ in which, recognizing that his Majesty's 'obedient and loving subjects cannot use or exercise themselves according to their estates, degrees, faculties, and qualities,' it was enacted: 'That all and every person and persons having or which hereafter shall have any manors, lands, tenements, or hereditaments, holden in socage,² or of the nature of socage tenure, and not having any manors, lands, tenements, or hereditaments holden of

¹ 32 Hen. VIII. c. 1.

² 'Free tenure is where the tenant holdeth of his lord the tenancy by certain service for all manner of services, so that the service be not knight's service. As where a man holdeth his land of his lord by fealty and certain rent for all manner of services; or else where a man holdeth his land by homage, fealty, and certain rent for all manner of services; or where a man holdeth his land by homage and fealty for all manner of services; for homage by itself maketh not knight's service.' Littleton's Tenures, § 117, Coke. After the abolition of (what was left of) the feudal tenures, in the time of Charles the Second socage tenure became simply tenure by payment of certain rent. As such it came to this country.

the king . . . by knight's service, by socage tenure in chief or of the nature of socage tenure in chief, nor of any other person or persons by knight's service, from the twentieth day of July, in the year of our Lord 1540, shall have full and free liberty, power, and authority to give, dispose, will and devise, as well by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life, all his said manors, lands, tenements, and hereditaments, or any of them at his free will and pleasure.'

Other sections follow, extending the power, with certain reservations of the ancient incidents of tenure, such as primer seisins, fines on alienation, and wardships; the net effect being that socage tenants in fee-simple¹ could dispose of their socage lands freely and two-thirds of their lands held by knight service. In the next century Parliament abolished the military tenures, turning knight service into socage tenure, and thus extended one's power of disposition over all one's fee-simple lands.² The Statute of Frauds followed, requiring for the first time that all wills of land not nuncupative should be in writing, signed by the testator or by some one in his presence by his direction, and witnessed by three or four credible witnesses.³ And thus the law was brought over to this country by our ancestors.

¹ This by the interpreting statute of 34 and 35 Hen. VIII. c. 5, § 3 (A. D. 1542-3).

² 12 Charles II. c. 24 (A. D. 1660).

³ The present law of wills in England is founded upon the Wills Act, 7 Wm. IV. and 1 Vict. c. 26. See Digby, *Hist. Real Prop.* 300.

PART II.

THE NATURE OF A WILL.

CHAPTER III.

ELEMENTS OF A WILL.

A WILL, otherwise called a testament,¹ is (1) a written instrument (2) duly executed and attested, or (3) a nuncupation, by which (4) a competent person makes (5) a voluntary disposition (6) of property (7) in favor of another competent person, (8) to take effect after the maker's death, (9) meantime being revocable. Or it is (10) a written instrument duly executed and attested, nominating an executor,² or a post-mortem guardian of minor children of the maker.

Definition:
division of subject.

The divisions marked by numerals point out the Elements of a Will, and accordingly may, the last one excepted, be taken as the subjects of so many divisions for first consideration. These divisions indicate what a will must contain at the very least; a will may and often does contain much more. As for the sort of will by which one nominates an executor, or a post-mortem

¹ This word in early times was used of any instrument creating rights. See Pollock and Maitland's *Hist. of English Law*, ii. 315. It was often used thus: 'I mak my testament concernyng my last wyll in this wyse.' *Furnivall's Fifty English Wills*, 92 (A. D. 1432-3); 'my present testament of my last wyll.' *Id.* 94 (A. D. 1433); 'my testament conteynyng my laste wyll.' *Id.* 99 (A. D. 1434). It was applied particularly to wills of personalty until recent times; but now there is no distinction between 'testament' and 'will.' It is common to speak of one's 'last will and testament,' but the expression is a pleonasm; it is enough to say 'last will.'

² In *re Hickman*, 101 Cal. 609.

guardian of one's minor children, that subject may be dismissed as not calling for special examination.¹ The written revocation of a will, for another thing, is a sort of testamentary act, but it is not, properly speaking, a will, and hence does not fall within the foregoing definition.²

We are now to analyze the definition in a series of chapters.

¹ *Prater v. Whittle*, 16 S. Car. 40 (executor); *In re Hickman*, 101 Cal. 609 (executor); *Jarman, Wills*, 34, 35 (guardian of minors).

² See *Bailey v. Bailey*, 5 Cush. 245. In this case Shaw, C. J., speaking of a writing in two lines which read, 'It is my wish that the will that I made be destroyed, and my estate settled according to law,' said: 'Strictly speaking it was not a last will and testament, because it did not devise or bequeath property, or republish a former will, or nominate an executor.' It may be added, that a revocation, in its very nature, takes effect at once.

CHAPTER IV.

‘ WRITTEN INSTRUMENT.’

THE English Statute of Frauds first made writing necessary; this and similar legislation in this country require all wills of realty, except wills by English Statute nuncupation, to be written. And at the of Frauds. present day the requirement is generally extended by statute to wills of personalty; all wills not nuncupative must be in writing. The English statute, which was passed in the twenty-ninth year of the reign of Charles the Second, provided that all devises and bequests of lands or tenements should be in writing and signed by the testator, or by some other person in his presence and by his direction, and should be attested and subscribed in the testator's presence by three or four credible witnesses.¹ This statute has been the rough model, directly or remotely, of all the legislation upon the subject in this country.

That statute gave place, in the first year of the present reign in England, to more extended and definite legislation. This later legislation provides that all wills (which are not nuncupations) shall be in writing and signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence

Wills Act:
American legis-
lation.

¹ 29 Car. II. c. 3, § 5.

of two or more witnesses present at the same time, and attesting and subscribing the will in the presence of the testator.¹ Similar legislation, in many cases with no material difference, has taken place in this country; but for the present purpose nothing beyond the requirement of a writing will be considered. Upon that point the law is that the writing must be taken as the final evidence of the testator's intention,² and the writing, to be a will under the statute, must be a completed written will.

In accordance with this statement of the law, mere parol or even written testamentary declarations by a testator, of his wishes or intentions in regard to the disposition of his property, whether contemporaneous with the execution of the will or before or after, are not allowed in evidence, in the absence of fraud,³ to affect the written will.⁴ The testator cannot even create a valid *testamentary* trust, not duly executed and attested, in opposition to the terms of his written testament, — unless to exclude evidence of the trust would enable a devisee or legatee to commit a fraud upon another; in that case the trust, though oral, may be proved. Thus it is permitted to show that the testator has been induced by a devisee or

Parol declarations at variance with will: fraud: trust.

¹ 1 Vict. c. 26, § 9. This statute is called the Wills Act.

² *Foster v. Smith*, 156 Mass. 379, 385; *Smith v. Smith*, 54 N. J. Eq. 1; *Jackson v. Alsop*, 67 Conn. 249; *Priest v. Lackey*, 140 Ind. 399 (equity cannot correct mistakes not apparent on the face of the will); *Hawke v. Chicago Railroad*, 165 Ill. 561; *In re Langford*, 108 Cal. 609; *Kirkpatrick v. Jenkins*, 96 Tenn. 85; *Gilmor's Estate*, 154 Penn. St. 523.

³ Fraud on the testator may of course be shown by oral evidence. *Bigelow*, *Fraud*, i. 187-190.

⁴ *Orth v. Orth*, 145 Ind. 184, 190; *Olliffe v. Wells*, 130 Mass. 221; *Smith v. Smith*, 54 N. J. Eq. 1.

legatee of the will, by promise or otherwise, to omit from his will a gift which he would have made had not such inducement been held out to him.¹ In such a case equity, it is said, rather than the testator, raises a trust and converts the devisee or legatee into a trustee for the purpose of compelling him to carry out the intention of the testator, thus preventing him from committing a fraud by taking the property to himself.² But equity never raises such a trust except in cases in which the devisee or legatee in some way, by word, act, or misleading silence, induces or at least encourages the testator to give the property to him in reliance upon his honesty.³

In some of the States legislation distinguishes in regard to holographs (also written 'olographs'), or unattested wills written entirely by the testator.

Thus under such legislation it is laid down Holographs. that a will not properly executed with subscribing witnesses may still be good as a holograph if it answer the requirements of the law as such a will.⁴ Nor will the fact that the instrument shows that attestation was contemplated and not carried out operate against it as a holograph.⁵ And though one's will itself be not a holograph, there may be a holographic codicil to it.⁶ So, too, an ordinary attested will may under such legislation

¹ *Schultz's Appeal*, 80 Penn. St. 396, 402; *In re O'Hara*, 95 N. Y. 403; *Olliffe v. Wells*, 130 Mass. 221, 223; *Hooker v. Axford*, 33 Mich. 453; *Dowd v. Tucker*, 41 Conn. 197; *Barrell v. Hanrick*, 42 Ala. 60; *McLellan v. McLean*, 2 Head, 684; *Bigelow, Fraud*, i. 457-459. But see the distinction stated in *Olliffe v. Wells*.

² *Schultz's Appeal*, supra; *In re O'Hara*, supra.

³ Same cases.

⁴ *Brown v. Beaver*, 3 Jones, 516.

⁵ *Perkins v. Jones*, 84 Va. 358.

⁶ *In re Soher*, 78 Cal. 477.

be revoked by a holograph.¹ But it is fatal to a holograph that any part of it, even the date, is printed.² Figures, however, may be written, to express the amount bequeathed.³

The requirement of a writing is satisfied by the production of a printed or lithographed form, with or without blanks for names of beneficiaries, amount to be given, and similar items, to be filled up in writing. This, which doubtless is sound construction of such statutes as are above referred to, is itself matter of legislation in England, with a view, no doubt, to prevent any question upon the point.⁴ Such instruments are constantly admitted to probate in England.⁵

The American statutes do not require the use of ink; a pencil may be used.⁶ But when the question is whether the testator intended the paper in question as a final testamentary declaration of his mind, or whether it was only preparatory to a more formal disposition, the material with which it was written becomes a very important circumstance.⁷ Alterations in pencil of an executed will naturally stand in a less favored light. Such alterations may perhaps be allowed in probate; but the presumption, at least in England, though not everywhere here, is that where alterations in

¹ Reagan v. Stanley, 11 Lea, 316.

² In re Billings, 64 Cal. 427.

³ In re Vanhille, 49 La. An. 107.

⁴ 52 and 53 Vict. c. 63, § 20.

⁵ Jarman, 78.

⁶ Tomlinson's Estate, 133 Penn. St. 245. So in England, formerly at any rate. In re Dyer, 1 Hagg. 219; Parkin v. Bainbridge, 3 Phill. 321.

⁷ Parkin v. Bainbridge, *supra*; Rymes v. Clarkson, 1 Phill. 35.

pencil only have been made, they are deliberative and not final, whereas if they are in ink they are final.¹ A will further may be written *upon* any material permanent enough to hold its language; though here again the nature of the material may be a circumstance of importance upon a question whether the writing was intended to be final or only deliberative.²

¹ Hawkes *v.* Hawkes, 1 Hagg. 321; Edwards *v.* Astley, id. 490. But see Tomlinson's Estate, 133 Penn. St. 245. In regard to erasures as partial revocation, see chapter xii.

² Rymes *v.* Clarkson, *supra*.

CHAPTER V.

'EXECUTED AND ATTESTED.'

THE statutes all require a signing of written wills. This may be by the testator's mark,¹ even though he could write;² unless the statute requires the signing of the testator's name.³ Anything may be taken for a mark; the initials of the testator are enough;⁴ the use of a wrong or an assumed name will suffice, since such a signature might well be treated as the equivalent of a mark.⁵ For the same reason the signature of the testator's first name alone satisfies the law.⁵ It would not invalidate the execution that against the mark a wrong name was written,⁶ or that the testator himself was wrongly named in the body of the will.⁷ Of course another person may guide his hand, whether in writing his own name or in

¹ *Fritz v. Turner*, 46 N. J. Eq. 515; *Robinson v. Brewster*, 140 Ill. 649; *Main v. Ryder*, 84 Penn. St. 217; *Long v. Zook*, 13 Penn. St. 400; *Thompson v. Thompson*, 49 Neb. 157; *Bailey v. Bailey*, 35 Ark. 687; *St. Louis Hospital v. Wegman*, 21 Mo. 17; *Hanswyck v. Wiese*, 44 Barb. 494; *Upchurch v. Upchurch*, 16 B. Mon. 102; *Chase v. Kittedge*, 11 Allen, 49; *Higgins v. Carlton*, 28 Md. 115.

² *Jackson v. Van Dusen*, 5 Johns. 144; *St. Louis Hospital v. Wegman*, *supra*; *Smith v. Dolby*, 4 Harrington, 350. See *Fritz v. Turner*, 46 N. J. Eq. 515.

³ *In re Walker*, 110 Cal. 387, 395, 396. So in New York. *Id.* See *In re Guilfoyle*, 96 Cal. 498.

⁴ *In re Savory*, 15 Jur. 1042.

⁵ *Knox's Estate*, 131 Penn. St. 220. See *Rook v. Wilson*, 143 Ind. 24.

⁶ *In re Clarke*, 4 Jur. n.s. 243; s. c. 1 Swab. & T. 22; *Rook v. Wilson*, 143 Ind. 24; *Cleveland v. Spilman*, 25 Ind. 95.

⁷ *In re Dowse*, 31 Law. J. Prob. 172.

making his mark.¹ And the testator might write his name upon a separate piece of paper and paste the paper, or otherwise fasten it, to the will.² In case of a re-execution of a will it would not be sufficient for the testator to pass over his former signature with a dry pen; he must do something which appears on the face of the paper.³

Sealing is not required and will not of itself take the place of signing.⁴ It is possible, however, that the use of a seal might be such as to justify the courts in treating it as the equivalent of a ^{Sealing.} mark; as for instance where a testator uses a seal containing his initials, impressing it upon the writing with intent to execute the same as a will,⁵ such intent appearing upon the instrument itself.

The statutes generally do not require the testator to sign the will in person; he may *direct*⁶ another to sign it for him.⁷ The person so ^{Signature by another.} directed and acting may be a witness⁸ to the will and

¹ *Fritz v. Turner*, 46 N. J. Eq. 515; *Wilson v. Bedard*, 12 Sim. 28; *Vandruff v. Rinehart*, 29 Penn. St. 232; *Vines v. Clingfost*, 21 Ark. 309; *McMechen v. McMechen*, 17 W. Va. 683.

² *Cooke v. Lambert*, 32 Law J., Prob. 182; *In re Horsford*, L. R. 3 P. & D. 211.

³ See *Playne v. Scriven*, 1 Rob. Eccl. 772 (witness).

⁴ In early times execution of written instruments by sealing without signature was common; but the statutes now require that wills shall be signed.

⁵ *In re Emerson*, 9 L. R. Ir. 443.

⁶ Knowledge and assent are not equivalent to direction. *Murry v. Hennessey*, 48 Neb. 608.

⁷ *Riley v. Riley*, 36 Ala. 496; *Vines v. Clingfost*, 21 Ark. 309; *Murry v. Hennessey*, 48 Neb. 608; *Vandruff v. Rinehart*, 29 Penn. St. 232. See also *Main v. Ryder*, 84 Penn. St. 217; *In re Jenkins*, 43 Wis. 610; *Simpson v. Simpson*, 27 Mo. 288. Contra in New Jersey. *Fritz v. Turner*, 46 N. J. Eq. 515.

⁸ *St. Louis Hospital v. Wegman*, 21 Mo. 17; *Simpson v. Simpson*, *supra*.

may sign the will with his own name instead of the testator's.¹ Indeed the statute in some States requires that the act shall be done by a witness, when the testator himself does not sign; in which case, and perhaps in all cases, the witness is required to add that he wrote the signature by request of the testator.² An impression of the testator's signature, made by his direction, has been held a good signature of the will.³

The testator need not sign in presence of the witnesses to the will unless statute require that he shall.⁴

The fact that wills are often written upon several sheets of paper makes it a matter of proper precaution that the testator should sign each sheet; but the statutes do not require such care, and it is very seldom taken. One signature is enough;⁵ and the question, if one be made, whether all the sheets were attached at the time of signing, or whether there has since been a fraudulent addition to the instrument, is for the jury.⁶ There is probably a presumption that there has been no such addition;⁷ also that any apparent change of order in the sheets preceded execution.⁸

Next in regard to the position of the testator's signature. The mere provision of statute that there shall be a signature by the testator does not require that the signature shall be at the end of

¹ In re Clark, 2 Curteis, 329.

² Simpson v. Simpson, *supra*.

³ Jenkyns v. Gaisford, 3 Swab. & T. 93.

⁴ Chase v. Kittredge, 11 Allen, 49. See *infra*, acknowledgment.

⁵ Tonnele v. Hall, 4 Comst. 140; Wikoff's Appeal, 15 Penn. St. 281; Jones v. Habersham, 63 Ga. 146.

⁶ Ginder v. Farnum, 10 Barr, 98.

⁷ Marsh v. Marsh, 1 Swab. & T. 528.

⁸ Rees v. Rees, L. R. 3 P. & D. 84. See Grubb's Estate, 174 Penn. St. 187.

the will. So, at any rate, it is more generally held,¹ though no doubt 'signature' in ordinary speech signifies a name at the end of a writing. And that fact has caused the courts to declare that anything alleged to be a signature, which does not come at the end of the will, must be shown to have been written with intent to execute the instrument.² It has accordingly been laid down, under such statutes, that where the testator's name appears only at the beginning or in the body of the will the will must be in the testator's handwriting, and that he must have intended the signature, wherever written, to be a final execution.³ If there be language in the will indicating that it was intended that a signature should be added, there is no execution without such signature. Such a case would be made by the appearance at the end of the will of a clause of execution, such as 'In testimony whereof I have hereunto set my hand,' &c.⁴

Evidence that writing the testator's name elsewhere than at the end of the will was intended as an execution may appear upon the will itself, and that Signature not at end of will. too without express language to that effect. Thus a testamentary instrument not signed at the foot, but having the testator's name at the top, with a seal attached, and manifesting deliberation and care in the disposition of property, has been held to have been duly signed, under statute merely requiring the testator's signature.⁵ Or perhaps the intention may be shown

¹ *Armstrong v. Armstrong*, 29 Ala. 538; *Watts v. Public Adm'r*, 4 Wend. 168; *In re Miles*, 4 Dana, 1; *Adams v. Field*, 21 Vt. 256; *Catlett v. Catlett*, 55 Mo. 330. *Contra*, *Warwick v. Warwick*, 86 Va. 596.

² *In re Booth*, 127 N. Y. 109.

³ *Catlett v. Catlett*, 55 Mo. 330.

⁴ *Id.*

⁵ *Watts v. Public Adm'r*, *supra*. See *In re Booth*, 127 N. Y. 109.

by external evidence; that is, by evidence not in the will.¹

Other legislation requires the signature of the testator to be written at the end of the will.² But even this legislation has not always cut off room for doubt, for what is meant by 'end of the will' may not always be clear.³ Thus suppose that after the signature, otherwise at the end of the will, there appears part of a sentence left incomplete before the signature,⁴ or a sentence authenticating some correction in the writing,⁵ or words explaining some expression in it, or giving the place of residence of some one named, and that such addition, being written before execution, has not the testator's signature, is the will signed at 'the end'? Probably it is, unless the language of the statute is so precise as to preclude such interpretation; substantial compliance would be enough.⁶ But if what is added contains some new or altered disposition of property, or if it consists in the appointment of executors or trustees, it seems that the signature of the testator preceding is not at the 'end' of the will.⁷

¹ *Ramsey v. Ramsey*, 13 Gratt. 664; *Dunn v. Dunn*, L. R. 1 P. & D. 277.

² In re Walker, 110 Cal. 387. So in other States.

³ See *Wineland's Appeal*, 118 Penn. St. 37; *Baker v. Baker*, 51 Ohio St. 217; *Hallowell v. Hallowell*, 88 Ind. 251; *Flood v. Pragoff*, 79 Ky. 607; *In re Conway*, 124 N. Y. 455; *Watts v. Pub. Adm'r*, supra.

⁴ In re Kimpton, 3 Swab. & T. 427; *Baker v. Baker*, 51 Ohio St. 217; and many other cases.

⁵ In re Wilkinson, L. R. 6 P. D. 100.

⁶ In re Voorhis, 125 N. Y. 765; *Baker v. Baker*, 51 Ohio St. 217; *Stricker v. Groves*, 5 Whart. 386. See also *In re Birt*, L. R. 2 P. & D. 214; *In re Coombs*, L. R. 1 P. & D. 302.

⁷ *Baker v. Baker*, 51 Ohio St. 217. Compare *In re Woods*, L. R. 1 P. & D. 556, on the present English statute, which however is very precise.

Statutes further require either that the will itself as such, or that the testator's signature, being visible to the witnesses to the will, shall be acknowledged by the testator before the witnesses;¹ ^{Acknowledg-}ment.

some statutes, indeed, require both of these acts. The first-mentioned step, acknowledging the will as such, is called publication. This is not necessary unless called for by statute; in the absence of statute, then, the witnesses need not know that they are subscribing a will.²

Proof of publication, when required, may be made without evidence of express words, such as, 'This is my will,' or 'my last will;' any communication or act by the testator, or another duly acting for him, which informs the witnesses plainly that he intends the instrument to operate as his will is enough.³ The nephew of a testatrix who lay on her deathbed, in extremis, brought into the room three men to witness a will which had been prepared (by direction of the nephew) for her to sign; whereupon the testatrix roused up and exclaimed, 'What does this mean?' The nephew, as he testified, replied, 'I got these men to witness the will.' The testatrix then made her mark to the instrument, and the witnesses signed the attestation clause. This was held a compliance with the statute in regard to acknowledgment.⁴

¹ In re Landy, 148 N. Y. 403; In re Mackay, 110 N. Y. 611.

² Dewey v. Dewey, 1 Met. 349; Tilden v. Tilden, 13 Gray, 110; Dean v. Dean, 27 Vt. 746; Watson v. Pipes, 32 Miss. 451; Huff v. Huff, 41 Ga. 696; Allen v. Griffin, 69 Wis. 529; Canada's Appeal, 47 Conn. 450; Flood v. Pragoff, 79 Ky. 607.

³ Coffin v. Coffin, 23 N. Y. 9; Elkinton v. Brick, 44 N. J. Eq. 154; Darnell v. Buzby, 50 N. J. Eq. 725; Hildreth v. Marshall, 51 N. J. Eq. 341, 349. Publication may be by act, as by sign, as well as by words. Robbins v. Robbins, 50 N. J. Eq. 742.

⁴ Hildreth v. Marshall, 51 N. J. Eq. 241, 249. 'Her intelligent execution of the will, after such a declaration, is an acquiescence in it and assent to it.'

But under such requirement of the law some act or declaration by the testator or another for him should be shown whereby, at the time of the execution, he indicated the instrument to be his last will and desired the witnesses to sign it as such.¹ Accordingly the mere knowledge of the witnesses of the nature of the instrument will not satisfy the statute.² Nor will it satisfy the statute that the testator requests the witnesses to sign 'this paper.'³ Reading the will before the testator and the witnesses, all then signing at the same time, is, however, enough.⁴ The act or declaration, too, need not be directly by the testator; another, for instance the scrivener, may act for him, if clearly authorized to do so.⁵ The publication should be before all the witnesses at the same time.⁶ Acknowledgment of signature need not be proved under a requirement of publication.⁷

The statute in most of the States requires no more than that the testator shall acknowledge his signature;⁸ but, like publication, even this acknowledgment of signature is not necessary unless statute requires it.⁹ The two acts, however similar in appearance, differ materially from each other. Thus no acknowledgment of the will as a will, however plain the language, can amount to an

¹ *Bagley v. Blackman*, 2 Lans. 41; *Tunison v. Tunison*, 4 Bradf. 138; *Rutherford v. Rutherford*, 1 Denio, 33; *In re Nelson*, 141 N. Y. 152 (what amounts to a request to witness).

² *Gilbert v. Knox*, 52 N. Y. 125; *In re Nelson*, supra.

³ *In re Rawlins*, 2 Curteis, 326; *Ilott v. Genge*, 3 Curteis, 160. See *Hildreth v. Marshall*, 51 N. J. Eq. 241.

⁴ *Moore v. Moore*, 2 Bradf. 261.

⁵ *Gilbert v. Knox*, supra; *Peck v. Cary*, 27 N. Y. 9; *In re Nelson*, supra; *Elkinton v. Brick*, 44 N. J. Eq. 154; *Hildreth v. Marshall*, 51 N. J. Eq. 241, 249.

⁶ *Seymour v. Van Wyck*, 2 Seld. 120; *Tyler v. Mapes*, 19 Barb. 448.

⁷ *Hogan v. Grosvenor*, 10 Met. 54; *Dewey v. Dewey*, 1 Met. 349.

⁸ See, e. g., *Grimm v. Tittman*, 113 Mo. 56.

⁹ *Dewey v. Dewey*, 1 Met. 349; *Hogan v. Grosvenor*, 10 Met. 54.

acknowledgment of the testator's signature.¹ Still it is not necessary that the testator should in words say, 'That is my signature,' or the like;² the statute is complied with if it appears that the signature was written upon the will when the will was shown to the witnesses and was seen, or might have been seen, by them when they subscribed.³ That amounts to showing the signature, and requesting the witnesses thereupon to subscribe is practically acknowledging it.⁴ But a statute which requires a signing by the testator in *presence* of the witnesses would not be met by an acknowledgment of a signature not written in their presence.⁵

The acknowledgment of signature, like publication, must be made in the presence of the required number of witnesses present at one and the same time.⁶ It will not suffice that acknowledgment has been made to some of the witnesses, or to all of them unless they were present simultaneously.

If the statute requires proof of both steps, publication and acknowledging the signature, each must be distinctly

¹ See *Lewis v. Lewis*, 11 N. Y. 220; s. c. 13 Barb. 17; *In re Rawlins*, 2 Curteis, 326; *In re Harrison*, id. 863; *Ilott v. Genge*, 3 Curteis, 160; *Blake v. Blake*, 7 P. D. 102.

² See *In re Laudy*, 148 N. Y. 403; *In re Mackay*, 110 N. Y. 611.

³ *Allison v. Allison*, 46 Ill. 61.

⁴ *In re Mackay*, 110 N. Y. 611; *Willis v. Moot*, 36 N. Y. 486; *Dewey v. Dewey*, 1 Met. 349; *Ela v. Edwards*, 16 Gray, 91; *Blake v. Knight*, 3 Curteis, 547; *Keigwin v. Keigwin*, id. 607; *In re Ashmore*, id. 756. The testator may sign directly after acknowledgment. *Jackson v. Jackson*, 39 N. Y. 153.

⁵ *Mickle v. Matlack*, 2 Harrison, 86; *Den v. Milton*, 7 Halst. 70; *Combs v. Jolly*, 2 Green, Ch. 625; *Abraham v. Wilkins*, 17 Ark. 292. See *Hildreth v. Marshall*, 51 N. J. Eq. 241.

⁶ *Stirling v. Stirling*, 64 Md. 138; *Chase v. Kittredge*, 11 Allen, 49; *Welch v. Adams*, 63 N. H. 344; *Sisters of Charity v. Kelly*, 67 N. Y. 409.

proved. Proof of publication will not make proof of acknowledgment of signature, nor will proof of acknowledgment of signature make proof of publication.¹

The next requirement of statute is the attestation of the will by the signature of witnesses. At least two, in some States at least three, persons must attest the will. The English Statute of Frauds² required the attesting witnesses to be 'credible;' later legislation both in England and in this country requires that they shall be 'competent.'³ The requirement of competency calls, of course, for mental qualification; idiots and lunatics are incompetent, while infancy is no disqualification. Blindness cannot disqualify a witness, where (as generally is the case) the testator is permitted to acknowledge his signature before the witnesses. Ability to hear is not necessary; the witness may be made to understand what is wanted, by signs or by writing.⁴

There is also an important disqualification arising from interest, like the ancient common-law disqualification of interest in witnesses before the courts. It is looked upon as inconsistent that one who takes an interest under the will should be an attesting witness to its validity. Under the English Statute of Frauds one to whom a devise or a legacy was made was thereby deemed not 'credible' as a witness to the will; that is, the gift

¹ *Baskin v. Baskin*, 36 N. Y. 416; *Lewis v. Lewis*, 11 N. Y. 220.

² 29 Car. II. c. 3, § 5.

³ 'Credible' held to mean 'competent.' *Fisher v. Spence*, 150 Ill. 253, 257.

⁴ The attestation clause is some evidence of due execution. In *re Nelson*, 141 N. Y. 152; In *re Bernssee*, id. 389; In *re Cottrell*, 95 N. Y. 399; *infra*, statements of attesting clause.

rendered him incompetent to attest the will, at all events if he accepted the bequest.

It was doubtful, however, whether the question of competency was to be determined as of the time of the execution of the will or of the judicial inquiry at the probate. The better view appears to have been that the critical moment was the time of execution, since it was then that the testator's sanity was to be pronounced upon.¹ In some of our States, however, the other view has obtained in the statutes, and the consequence is that the attesting witness becomes competent by releasing his interest, or by his refusing to accept the gift, or receiving it in advance in the lifetime of the testator.

In many other States statute has made the attesting witness competent by depriving him of the benefit. This is, of course, an indirect declaration that the test of competency is to be determined as of the time of executing the will. It is as if the statute said that a devisee or a legatee should not witness the will, if he desires the gift; the moment he attests the will he makes void the bequest. In one or two of the States a legatee or a devisee neither loses the gift by attesting the will, nor is incompetent to attest it.² The Massachusetts statute does not apply to *attesting* witnesses; the competency of such witnesses is determined by the rules of the common law.³

The witnesses, like the testator, may sign by mark.⁴ So, too, the initials of a witness may be used for his

¹ Fisher v. Spence, 150 Ill. 253, 257; Schouler, Wills, § 351.

² Vester v. Collins, 101 N. C. 114; Hampton v. Hardin, 88 N. C. 592. See, upon the whole subject, Jarman, 69.

³ Hitchcock v. Shaw, 160 Mass. 140, 141. See Hawes v. Humphrey, 9 Pick. 350, 356. As to the competency of husband or wife of devisee or legatee, see Lippincott v. Wikoff, 54 N. J. Eq. 107; Fisher v. Spence, 150 Ill. 253.

⁴ Davis v. Semmes, 51 Ark. 48; Osborn v. Cook, 11 Cush. 532;

signature,¹ that is, if they are intended as an attestation of the execution of the will. And one witness may in some States sign the name of another, if the latter being present at the time request him to do so.² The validity of such act depends upon the authority of the person so acting, and not upon the sort of act he does.³ Indeed there appears to be no distinction in regard to the *form* of signature between the signature of the testator and that of the witnesses to the will.

In the absence of statute the witnesses may subscribe the will anywhere. Thus where a will ends on the first page of a folded sheet, the witnesses may sign on the fourth page.⁴ So a will ending in the middle of the third page, and one of the witnesses signing at the end, the other or others may sign in a vacant space on the second page opposite the other signature.⁵ But where any part of the will follows the signature of witnesses, it must be shown that such part was written before the witness or witnesses signed.

But in some States attestation must be made at the end of the will, and any unnecessary or unreasonable blank between the signature of the testator and the attestation will be fatal.⁶ In some States the attesting witnesses

Lord *v.* Lord, 58 N. H. 7; Pridgen *v.* Pridgen, 13 Ired. 259; McFarland *v.* Bush, 94 Tenn. 538.

¹ In re Christian, 2 Rob. Eccl. 110.

² Jesse *v.* Parker, 6 Gratt. 57; Upchurch *v.* Upchurch, 16 B. Mon. 102. Contra, Horton *v.* Johnson, 18 Ga. 396; McFarland *v.* Bush, supra; Simmons *v.* Leonard, 91 Tenn. 183.

³ Lord *v.* Lord, 58 N. H. 7; Jesse *v.* Parker, and Upchurch *v.* Upchurch, supra.

⁴ In re Braddock, 1 P. D. 433.

⁵ Roberts *v.* Phillips, 4 El. & B. 450.

⁶ Soward *v.* Soward, 1 Duv. 126.

may sign *within* or at the end of the attestation clause.¹ It appears to be immaterial, in the absence of particular provision by statute, whether the witnesses sign in point of time before the testator signs, provided that attestation and execution are both attended to at one time, so that the witnesses can see the testator's signature.²

The witnesses must, in most States, sign at the request, actual or implied, of the testator;³ not necessarily by the personal request of the testator, for the request may come from any one authorized ^{Request to witness.} by him to make it, as, for instance, the draughtsman of the will, but it must in law be by request of the testator.⁴ No particular form of request is prescribed; any communication importing a request, though addressed to but one of the witnesses, will suffice if the fair interpretation of the act is that the request was intended for the other or others as well.⁵

The witnesses need not subscribe the will in the presence of each other unless (which is unusual) ^{Presence of witnesses.} statute require them to do so.⁶ But they must subscribe, according to most of the statutes, in the

¹ *Franks v. Chapman*, 64 Texas, 159.

² *O'Brien v. Galagher*, 25 Conn. 229; *Sechrest v. Edwards*, 4 Met. (Ky.) 163; *In re Bernsee*, 141 N. Y. 389, 392; *In re Mackay*, 110 N. Y. 611.

³ Request by the testator is not necessary in Nebraska. *Thompson v. Thompson*, 49 Neb. 157.

⁴ *In re Nelson*, 141 N. Y. 152 (what amounts to a request); *Gilbert v. Knox*, 52 N. Y. 125; *Peck v. Cary*, 27 N. Y. 9; *Dyer v. Dyer*, 87 Ind. 13; *Hildreth v. Marshall*, 51 N. J. Eq. 241, 249.

⁵ *Coffin v. Coffin*, 23 N. Y. 9.

⁶ *Grimm v. Tittman*, 113 Mo. 56; *Moore v. Spier*, 80 Ala. 129; *Simmons v. Leonard*, 91 Tenn. 183; *Johnson v. Johnson*, 106 Ind. 475; *Welch v. Adams*, 63 N. H. 344; *Chase v. Kittredge*, 12 Allen, 49; *Gaylor's Appeal*, 43 Conn. 81; *Willis v. Moot*, 36 N. Y. 486; *In re Smith*, 52 Wis. 543; *Flinn v. Owen*, 58 Ill. 111; *Webb v. Fleming*, 30 Ga. 808.

presence of the testator.¹ The object of the requirement plainly is that the testator may, if possible, be able to see that the instrument signed by the witnesses is the instrument executed by him as his will; it is thus that he himself is assured that when the will is offered for probate there will be evidence, in the attestation of these witnesses, to support the will. Great importance, then, is attached to the word 'presence,' in the expression 'in presence of the testator' or the like.

The word has always been treated as technical; but exactly what it means in certain cases is a difficult question.² 'Presence' clearly does not mean technical word. within sight, although the witnesses must be where they might be seen; for a man may see what is going on across the street, which certainly would not be in his presence. A blind man too can make a will; so, of course, could a man whose eyes were bandaged. The presence of others may be known by other senses than sight, as by hearing or feeling. Accordingly, a man though having unimpaired sight may depend upon his other senses to give him information of the presence of people.

A recent authority³ furnishes an illustration. The testator had received a severe injury, and was lying upon a bed, unable to move. His sight was unimpaired, but he could only look upward and could not see what took place when his will was attested. The attestation took place only about nine feet from him, in an adjoining room the door of which was open, and the act was in the line of vision had he been able to turn

¹ See the same cases; also *Swain v. Edmunds*, 53 N. J. Eq. 142, and cases *infra*.

² What follows is the substance of a note by the present writer to the last ed. of *Jarman on Wills*, p. 91.

³ *Riggs v. Riggs*, 135 Mass. 238.

in that direction. A few days afterwards an attestation was made to the will by witnesses within the same room in which the testator lay, and only four feet from him. The attestation in each case was held to have been made in the presence of the testator.

Some of the authorities, however, appear to hold that ability to see what is going on, in the case of a testator possessed of sight, is necessary. If, it is considered, the testator, being out of range of sight in his present position, can turn or move so as to see without an effort endangering life, the witnesses otherwise in a position to satisfy the statute are in his presence. But if for lack of strength he can get into position to see them only at the risk of his life, then, wherever the witnesses may be, they are not in his presence.¹ But this is questionable doctrine; it is practically taking from a man perfectly competent, it may be, to make a will the right to do so. A man is in my presence if I can reach him, or if, being in the same room with me, or in an adjoining room open directly between him and me, I can talk with him or hear his movements, notwithstanding the fact that I may be unable to turn my body or my head so as to see him.

It should be enough to say that when I can see from the place where I am, by turning if need be, nothing must be in the way of my seeing what is going on; if in such a case my vision is cut off, what I cannot see may be considered as not in my presence.² That is simply because the chief sense — that is, the sense usually and naturally relied upon for ascertaining such a fact as the presence of another — is fully at my service in regard to objects within its own operation. If it is not so at

¹ *Jones v. Tuck*, 3 Jones, 202; *Graham v. Graham*, 10 Ired. 219; *Maynard v. Vinton*, 59 Mich. 139; *Aikin v. Weckerly*, 19 Mich. 504.

² *Hamilton v. Fletcher*, 64 Ga. 549. See *Walker v. Walker*, 67 Miss. 529.

my service, and there is no external impediment making vision impossible,¹ I may have the benefit of any other trustworthy sense. Contiguity, with uninterrupted view between the testator and the subscribing witnesses, is both sufficient and essential.²

The authorities are agreed that it is not necessary that the attestation should be made in the same room, or even in the place,³ in which the testator is, so long as it is made within range of his sight if he can see. And perhaps it would be agreed that the same is true if the attestation is made within the cognizance of the testator's other senses, no closed walls intervening, — in case he is bereft of sight or has not the full use of his eyes.⁴ The better authorities generally go no further. The rule would not extend, for instance, to making an acknowledgment of the attestation by the witnesses equivalent to an attesting in the testator's presence. Still some of the courts have gone the length of treating such an acknowledgment as a compliance with the requirement of the statute.⁵

The testator further should be mentally capable of recognizing the act of the witnesses; his mere bodily presence would not be enough. Thus if a testator, after executing his will and before

¹ It seems to be no objection to an attestation that the curtain of a bed upon which the testator is lying is closely drawn, since he might draw the curtain aside. *Newton v. Clarke*, 2 Curteis, 320.

² *Witt v. Gardiner*, 158 Ill. 176, 181.

³ *Casson v. Dade*, 1 Bro. C. C. 99, where the testatrix, sitting in her carriage and having there executed her will, could thence see the witnesses attest it through a window in an office where they did so.

⁴ *Chase v. Kittredge*, 11 Allen, 49.

⁵ *Cook v. Winchester*, 81 Mich. 581; *Parramore v. Taylor*, 11 Gratt. 220; *Sturdivant v. Birchett*, 10 Gratt. 67.

the attestation should become insensible, the attestation would be invalid.¹ More than that, the testator must be actually conscious of what the witnesses are doing; if a will were attested in a secret manner, the fact that this was done in the room in which the testator was and within sight by him, would not suffice.²

All this, however, is a matter of statutory language, and it may be that in some States the statute does not require attestation to be made in the testator's presence. In such case acknowledgment of the act will suffice. Thus acknowledgment is enough under a statute merely requiring the attesting witnesses to sign their names as witnesses, 'at the request of the testator.'³

The statements made in the attestation clause are not conclusive; the witnesses themselves may show that they are not true.⁴ But the statements, when clear, as they usually are, are not easily overturned.⁵ Thus clear proof is required to overcome the statement that the witnesses signed in the testator's presence;⁶ failure of memory upon the point by the

¹ *Right v. Price*, Doug. 241 ; *Jarman*, 89.

² *Jenner v. Finch*, 5 P. D. 106 ; *Jarman*, 89.

³ *Chase v. Kittredge*, 11 Allen, 49, 61 ; *Ruddon v. McDonald*, 1 Bradf. 352 ; *Hoysradt v. Kingman*, 22 N. Y. 372. Attestation in the same room with the testator is prima facie in his presence. *Neil v. Neil*, 1 Leigh, 6 ; *Ayres v. Ayres*, 43 N. J. Eq. 565. Contra if not in the same room. *Neil v. Neil*, supra.

⁴ *Darnell v. Buzby*, 50 N. J. Eq. 725 ; *Robbins v. Robbins*, id. 742, 749.

⁵ See *In re Hogan*, 73 Wis. 78 ; *In re Nelson*, 141 N. Y. 152 ; *In re Hesdra*, 119 N. Y. 615 ; *In re Higgins*, 94 N. Y. 554 ; *In re Pepoon*, 91 N. Y. 255 ; *Rugg v. Rugg*, 83 N. Y. 592 ; *McCurdy v. Neall*, 42 N. J. Eq. 333 ; *Farley v. Farley*, 50 N. J. Eq. 434 ; *Darnell v. Buzby*, id. 725 ; *Swain v. Edmunds*, 53 N. J. Eq. 142 ; *Hildreth v. Marshall*, 51 N. J. Eq. 241, 249 ; *Wright v. Rogers*, L. R. 1 P. & D. 678 (requiring 'strongest evidence' to overturn the clause).

⁶ *In re Hogan*, supra.

witnesses will not suffice;¹ indeed a will can be proved against the evidence of the attesting witnesses.²

It is desirable that an attestation clause should be added, stating that the witnesses have subscribed or attested the will at the request of the testator and in his presence (simultaneously, if that is required), because such statement will furnish permanent evidence of the facts; but such a clause is not necessary unless statute require it, the mere signature of the witnesses, *animo attestandi*, being enough.³ That will be sufficient to raise a presumption that the statutory requirements have been complied with, though such presumption will not be as strong evidence of the fact as a clear attestation clause stating the facts would afford.⁴

Upon the death of the witnesses to the will, proof of execution begets a presumption that all the details thereof were according to law, unless the contrary appears upon the face of the will.⁵ There are cases, however, in which wills have been executed under powers prescribing certain forms. In such cases, though the witnesses are dead or cannot remem-

¹ *In re Hogan*, supra; *In re Pepoon*, supra.

² *Woolley v. Woolley*, 95 N. Y. 231; *In re Cottrell*, id. 329.

³ *Swain v. Edmunds*, 53 N. J. Eq. 142; *Olerich v. Ross*, 146 Ind. 282; *Robinson v. Brewster*, 140 Ill. 649; *Berberet v. Berberet*, 131 Mo. 399; *In re Phillips*, 98 N. Y. 267; *Allen v. Jeter*, 6 Lea, 672; *Peake v. Jenkins*, 80 Va. 293; *Webb v. Dye*, 18 W. Va. 376; *Moale v. Cutting*, 59 Md. 510; *Ela v. Edwards*, 16 Gray, 91.

⁴ See *Woolley v. Woolley*, 95 N. Y. 231; *Brown v. Clark*, 77 N. Y. 369; *In re Kellum*, 52 N. Y. 517; *Elkinton v. Brick*, 44 N. J. Eq. 154; *Ayres v. Ayres*, 43 N. J. Eq. 565; *In re Hogan*, 73 Wis. 78.

⁵ *Deupree v. Deupree*, 45 Ga. 415, 442; *Eliot v. Eliot*, 10 Allen, 357; *Barnes v. Barnes*, 66 Maine, 286; *Clark v. Dounorant*, 10 Leigh, 22; *Fatheree v. Lawrence*, 33 Miss. 622.

ber, no presumption of compliance arises unless the will itself or the attestation clause states the facts.¹

Alterations need not be specially attested, or even signed by the testator, unless statute require, where there is legal evidence that they were made Attesting alterations. before execution; in which case the execution and attestation cover them. But alterations of substance, which do not appear to have been made before execution, should by the law in most States be signed by the testator and attested by witnesses as in the case of the will itself, for such alterations are themselves testamentary in nature. If not signed and attested, such alterations will not be allowed, and the will as it stood without them, if still legible in that form, will prevail.² But a different rule prevails in some States, as will be seen in the chapter on revocation.³

INDIRECT EXECUTION: EXTRINSIC DOCUMENTS.

If the testator refers to external documents, will his signature to the will and the attestation of the witnesses thereto cover such documents; or, in order to make them a part of the will must they Unattested documents made part of the will. be separately signed and attested? The answer given is, that any document, itself attested or not, if in existence at the time of the execution of the will, and consistent with law, may by reference be incorporated into and made part of the will, or be set up by it, provided that the reference to it is distinct and clearly identifies the document in question, or renders

¹ *Deupree v. Deupree*, supra.

² *Eschbach v. Collins*, 61 Md. 478. See *Lovell v. Quitman*, 88 N. Y. 377, 381; *Law v. Law*, 83 Ala. 432.

³ Chapter xii.

identification practicable by extrinsic evidence. That is, such document need not be separately signed by the testator and witnessed for him.¹ The instrument is considered to be identified with the will as if it had been repeated word for word in the will itself.

This testamentary use of external documents is of far-reaching importance; more so, perhaps, than the mere statement of the doctrine would at first suggest. The doctrine applies to all documents of every description² which might, consistently with law, have been repeated in the will. In this way one may by will dispose of all the lands conveyed or devised to one by a certain deed or will; and, what is still more striking, unexecuted or defectively executed wills, or wills otherwise invalid, if capable of lawful execution, may be made good. Thus a codicil executed according to law, that is, as a testamentary instrument, may republish one's will so as to give effect to a devise or a legacy otherwise void on the ground, for instance, that the devisee or legatee is a witness disqualified by law.³ So a will invalid because executed under undue influence may be confirmed by a later codicil in which the testator has acted freely.⁴ The effect of the codicil in such a case is to give the same force to the will as if it had been executed at the date of the codicil.⁵ By the

¹ *Habergham v. Vincent*, 2 Ves. Jr. 204, 228; *In re Kehoe*, L. R. 13 Ir. 13; *Abbott's Cases*, p. 191; *Burton v. Newbery*, 1 Ch. D. 234; *Newton v. Seamen's Friend Soc.*, 130 Mass. 91; *Baker's Appeal*, 107 Penn. St. 381; *Vogel v. Lehritter*, 139 N. Y. 223, 235; *Brown v. Clark*, 77 N. Y. 360; *Tonnele v. Hall*, 4 Comst. 145; *Skinner v. American Bible Society*, 92 Wis. 209.

² See *Newton v. Seamen's Friend Soc.* 130 Mass. 91 Gray, C. J.

³ *Mooers v. White*, 6 Johns. Ch. 374, 375.

⁴ *O'Neill v. Farr*, 1 Rich. 80.

⁵ *Brimmer v. Sohler*, 1 Cush. 118; *Armstrong v. Armstrong*, 14 B. Mon. 333. See *Brown v. Clark*, 77 N. Y. 369.

same process, too, a former codicil, defective for any reason, may be made good by a later valid codicil.¹

The following example of the last proposition will serve for the whole subject: A testator made a will and two codicils, the first codicil not being attested. By the second, the will and a codicil annexed thereto were described in what was now stated to be a second codicil to the said will. This second codicil being executed and attested according to law, the first was thereby held to have been validated.²

Illustration.

The reference to the external document should be clear and distinct, and it should appear on the face of the will that the intention of referring to the document was to incorporate it into the will. A reference to another instrument, however clear and distinct such reference, is not enough to make it part of the will which refers to it.³

It should be observed, further, that the writing referred to must be referred to as then existing,⁴ and it must be in existence at the time of executing the will. Accordingly a testator cannot by will reserve a power to dispose of an estate in the future by an instrument not executed as required by statute; he cannot make a future disposition of property a subject of his will.⁵ The reason is, not that an instrument thereafter to be written cannot be sufficiently identified

¹ *Aaron v. Aaron*, 3 DeG. & S. 475.

² *Aaron v. Aaron*, *supra*.

³ See, e. g., *In re Murray*, 1896, P. 65.

⁴ *In re Sunderland*, L. R. 1 P. & D. 198; *In re Kehoe*, L. R. 13 Ir. 13; *Abbott's Cases*, p. 191. But if the external document is sufficiently referred to in the will, extrinsic evidence may be received, if needed, to identify a document produced as the one intended. *Id.*

⁵ *Habergham v. Vincent*, 2 Ves. Jr. 204; s. c. 4 Bro. C. C. 355; *Thayer*

by the will, but that the law does not allow the testator to declare by will what his will shall be. The statute contemplates only a present will, complete at the time of execution.

The testator may, however, make the disposition of his bounty turn upon writings to be made or acts to be done, provided that these, if by him, are not to be testamentary. A testator devised land to 'the persons who shall be in copartnership with me at the time of my decease, or to whom I shall have disposed of my business.' It was urged against this provision that the testator was leaving the determination of his devisees to an act not authorized by the statutory requirement¹ that wills must be in writing; but the court denied this, and sustained the provision. The disposition itself was complete on the face of the will, and that was enough. The future fact, upon which the devisees were to be determined, was not testamentary, and therefore the provision did not violate the statute.²

v. Wellington, 9 Allen, 283; *Langdon v. Astor*, 16 N. Y. 9; s. c. 3 Duer, 477. If then the testator should afterwards make the disposition mentioned in his will, that disposition would have to stand upon its own footing, as if the prior will had not been made.

¹ The Statute of Frauds.

² *Stubbs v. Sargon*, 2 Keen, 255; s. c. 3 Mylne & C. 507. Upon the validity of provisions in a will made in terms subject to oral arrangements made by the testator, see *Smith v. Smith*, 54 N. J. Eq. 1; *Olliffe v. Wells*, 130 Mass. 221, and the authorities reviewed in the latter case.

CHAPTER VI.

'NUNCUPATION.'

THE English Statute of Frauds did not require that wills of personalty should be written; but while legislation on both sides of the Atlantic has done away with this distinction, an exception has ^{Legislation.} been made in England and in many of our States of what are called nuncupations, or peculiar oral wills. The basis of all this is found in the legislation of Charles the Second, the same Statute of Frauds.

That statute declares that for preventing fraud in setting up nuncupative wills, no such will shall be good where the estate given shall exceed thirty pounds, and then only when proved by three witnesses at least, present when the will was made; nor unless it be proved that the testator when pronouncing the same bade the persons present, or some of them, to bear witness that such was his will; nor unless such will were made in the time of the last sickness of the deceased and in the house of his or her habitation or dwelling, or where he or she had resided for ten days or more next before making the will, except where such person was surprised or taken sick away from home and died before returning thither. There was a further provision, refusing probate of such wills after six months from making them unless they were committed to writing within six days after the words were spoken. Then, after a provision that written wills of goods should not be revoked by nuncupation, a

general proviso followed that soldiers in actual service and mariners or seamen at sea might dispose of their movables, wages, and personal estate, as before the Act.¹ Oral wills not nuncupative are everywhere invalid by statute.

As nuncupations make but a small part of the general subject, it will be best to dispose of them here once for all.

A simple general doctrine applies to the whole subject, based upon the theory that nuncupations should be treated as exceptional, and allowed only because of the special circumstances; they are not favored.² That doctrine is that such wills are only to be admitted to probate upon strictest proof that the requirements of the law have been met.³ These requirements, as they appear in the foregoing statement of the statute, relate (apart from the proviso in regard to soldiers and sailors) to the witnesses, to the last sickness of the testator, to his habitation, and to his absence from home. These special requirements may be commented upon in order.

To establish a nuncupative will, it is generally held that it must be shown with great clearness that the testator specially called upon the witnesses to bear witness to the act.⁴ And the required number of witnesses must be present at the same time,

Exceptional
kind of will:
consequences.

¹ 29 Car. II. c. 3, §§ 19, 20, 22; *Male's Case*, 49 N. J. Eq. 266, 276.

² *Male's Case*, 49 N. J. Eq. 266, 275.

³ *Biddle v. Biddle*, 36 Md. 630; *Scaife v. Emmons*, 84 Ga. 619; *Male's Case*, supra; *Carroll v. Bonham*, 42 N. J. Eq. 625; *Gould v. Safford*, 39 Vt. 498.

⁴ *Winn v. Bob*, 3 Leigh, 140; *Taylor's Appeal*, 47 Penn. St. 31; *Bennett v. Jackson*, 2 Phillim. 190. But see *Baker v. Dodson*, 4 Humph. 342.

and at the time when the testator calls upon them as witnesses of his will.¹ It is not enough for one witness to state that the testator at one time declared to him how he wished to dispose of his property, and then for another witness to state that the testator, at another time, made the same declaration to him, whatever may have been the condition of the testator.²

The words spoken before the witnesses further must have been spoken by the testator with intention to make a final disposition of the property. Directions and instructions for drawing up a written will, though given in presence of the requisite number of witnesses, and reduced to writing as required for nuncupations, cannot be considered as making a nuncupative will.³ Intention to make a written will is inconsistent with nuncupation; but some courts have held that a paper not completed as a written will may be established as a nuncupation if completion was prevented by act of God after the terms of the will were fully expressed.⁴

In regard to the requirement that the will must be made in the testator's last sickness, it has been laid down that it must be made when the testator is in such extremity that there is no

Final disposition must be intended.

Last sickness.

¹ Yarnall's Will, 4 Rawle, 46; Tally *v.* Butterworth, 10 Yerg. 501; Male's Case, 49 N. J. Eq. 266.

² Id.

³ Male's Case, 49 N. J. Eq. 266; Woods *v.* Ridley, 27 Miss. 119; Porter's Appeal, 10 Penn. St. 254; Yarnall's Will, 4 Rawle, 46; Dockum *v.* Robinson, 26 N. H. 372; Winn *v.* Bob, 3 Leigh, 140; Dorsey *v.* Sheppard, 12 Gill & J. 192.

⁴ Mason *v.* Dunman, 1 Munf. 456; Offut *v.* Offut, 313 Mon. 162; Boofter *v.* Rogers, 9 Gill, 44; Aurand *v.* Wilt, 9 Barr, 54. But see Tabler *v.* Tabler, 62 Md. 601; Dockum *v.* Robinson, *supra*; In re Hebden, 20 N. J. Eq. 473; Porter's Appeal, 10 Barr, 254.

time or opportunity to make a written will.¹ Accordingly nuncupative wills, made by consumptive persons nine days or even one day before death, have been held not valid.² If such wills are allowable at all in the case of persons having chronic diseases, making slow progress, it is declared that they are to be allowed only in the very last stage and extremity.³ The words 'last sickness' are not, according to the better view, to be construed as referring to the duration of the illness; they are generally considered to refer to a sudden and severe attack or phase of a malady (if it be a case of malady) just before death.⁴ But the authorities are not agreed upon the point, some holding that if the nuncupation is made at any time during the testator's last sickness it is enough, though the testator might have caused the supposed will to be written out, had he chosen to do so, so far as his condition at the time was concerned.⁵ Recovery by the testator of course revokes the will, for in that case it could not have been made in his last sickness.

In regard to the testator's 'habitation' and absence therefrom: It is held under a provision excepting cases
 Testator's hab- 'where the deceased is taken sick from
 itation. home and dies,' as distinguished from the words '*surprised* or taken sick' of the English statute, that a nuncupation not made at the testator's 'habitation,' nor where he had resided for ten days next before,

¹ Prince v. Hazleton, 20 Johns. 502; Haus v. Palmer, 21 Penn. St. 296; Reese v. Hawthorn, 10 Gratt. 548.

² In re Yarnall, 4 Rawle, 46; O'Neill v. Smith, 33 Md. 569.

³ Prince v. Hazleton, *supra*.

⁴ Carroll v. Bonham, 42 N. J. Eq. 625.

⁵ Nolan v. Gardner, 7 Heisk. 215; Sampson v. Browning, 22 Ga. 293; Harrington v. Steers, 82 Ill. 50; Page v. Page, 2 Rob. (Va.) 424. See note to Carroll v. Bonham, 42 N. J. Eq. 625.

may be valid though he was not 'surprised' by sickness there. It does not matter in such a case that the testator was very ill when he left home.¹

The provision concerning nuncupations by soldiers and sailors, also part of American legislation, has come before our courts occasionally,² but does Soldiers and sailors. not call for special remark beyond this, that such nuncupations stand upon ground of their own. The special requirements of ordinary nuncupations do not apply to those of soldiers or seamen; the wills of such persons, limited only by what they may dispose of by nuncupation, are not affected by the Statute of Frauds. But State legislation may have changed all that.

What are called gifts mortis causa must be clearly distinguished from nuncupations, which they somewhat resemble. These are gifts of personalty, Gifts mortis causa. orally made in apprehension of the donor's death, but conditional upon the happening of death in the particular peril in which they are made; they require for their validity delivery, as far as practicable, of the subject of gift; and they are revocable by the donor. The apprehension of death may be due not merely, as in nuncupations, to sickness, but also to old age, or to external danger such as shipwreck.³ Such transactions, unlike nuncupations, are not testamentary in law, and hence do not require probate; and, unlike nuncupations,

¹ Marks v. Bryant, 4 Hen. & M. 91.

² See Hubbard v. Hubbard, 12 Barb. 148; s. c. 4 Seld. 196; Warren v. Harding, 2 R. I. 133.

³ See Nicholas v. Adams, 2 Whart. 17; Michener v. Dale, 23 Penn. St. 59.

they may take place after the making of a written will, disposing of the same chattels. The most obvious distinction between such gifts in themselves and nuncupations is seen in the fact that the former are invalid without delivery.¹

¹ Kent, Comm. ii. 444-448.

CHAPTER VII.

'COMPETENT' TESTATOR.

STATUTE, varying more or less from State to State, has conferred upon married women testamentary capacity where they did not have it by the common law; the tendency of legislation being to ^{Married} _{women.} remove all restrictions founded merely upon marriage. That point, indeed, has been reached in many, if not in most, of the States.

At common law the power of a married woman to make a will was very limited. All her personal chattels 'reduced to possession' went to her husband absolutely; her husband had the use of her lands during the marriage, and he could dispose of her chattels real, or have them himself if he survived his wife. This, of course, cut down any disposing power the wife might otherwise have had; and then, further, statute sweepingly declared that a married woman could not dispose of lands.¹

But the wife's disability was not absolute. Of things due to her which had not been reduced into possession, as by the collection of the same, she could, it seems, make a bequest; and she could probably dispose of her paraphernalia, or necessary wearing apparel, without her husband's consent, though this was doubted. She could, at any rate, make her husband executor of such articles;

¹ 34 & 35 Hen. VIII. c. 5, § 14 (1542-3). This, however, was only a specific statement of the common law, thought necessary because of the Wills Act, 32 Hen. VIII. c. 1.

and if she did not, she, and not her husband's executor, would have them upon her husband's death. Further, of goods which she had as executrix she could by will appoint an executor without her husband's consent; if she did not appoint, administration of such goods went, not to her husband, but to the next of kin of the testator deceased who had made her executrix. But the goods themselves she could not dispose of by will except by consent of her husband.

It was a striking feature of the common law further that a married woman might make a will of her *husband's* goods, by his leave; and it was said that if she made a will of her husband's goods without his leave, and he suffered the will to be proved and delivered the goods accordingly, the will was made good.¹

But a much more striking fact was that, notwithstanding the common-law and statutory disability of a married woman, power could be conferred upon a married woman, without the action of the legislature, to make a will. It was considered that it was not intended by the law to deny that power. Accordingly, any one conveying or disposing of property to a married woman could confer upon her the power he possessed of disposing of it by will; this was but an incident of ownership, — it was only one of the terms upon which the property was transferred. But more than that, a woman about to marry could, by contract with her intended husband, reserve to herself the power which she possessed as a feme sole to make a will of her property. Nor was it necessary that a trust should be created and the property conveyed to a trustee for the purpose; an agreement merely between the feme and her

¹ Upon the whole subject see *Shep. Touchstone*, 402 (*Abbott's Cases*, p. 40), of which the text is a paraphrase.

intended husband was, in equity, enough.¹ And whether the power arose in the one way or the other, or in the way of a marriage settlement of the estate in trust, the power of disposal might extend to lands as well as to goods. But it was to such power alone that devisees had to look as the source of title to lands under the will. If, however, the power was well given or reserved, the will of a married woman acting upon it was as effectual in disposing of the property as the will of a person under no disability whatever.²

Such a power may³ be *conferred* before or after the marriage, though it could only be reserved (i. e., by the feme) before the marriage. Power conferred may emanate either from the husband or from a third person; a post-nuptial settlement upon the wife, with testamentary power, made by a stranger is valid, at least if the husband does not dissent.⁴

A power of disposal need not appear in a conveyance or bequest of personalty to the separate use of a married woman or woman about to be married, nor in a contract between a feme sole and her intended husband fixing the personalty to the woman's separate use. Unlike the power of disposing of realty, the power to dispose of personalty so given is an incident of the separate estate; a devisee must claim under a granted power of appointment; a legatee may claim under the separate ownership of the testatrix.

¹ *Bradish v. Gibbs*, 3 Johns. Ch. 523, 540; *West v. West*, 10 Serg. & R. 447. The wife's power in such a case was equitable; the legal estate would be in the heir, but the devisee could obtain it from him. *Jarman, Wills*, 40.

² *Holman v. Perry*, 4 Met. 492, 496; *Willcock v. Noble*, L. R. 7 H. L. 580, 590.

³ For convenience the present tense will now be used, as if common law still prevailed.

⁴ *Picquet v. Swan*, 4 Mason, 443.

In regard to the question of the age of capacity, infancy at common law was no objection to a will of personalty, but to dispose of realty a testator must have been twenty-one years of age. But the subject is now a matter of statutory regulation in this country, as it is also in England; and our statutes are not in harmony. In certain States a man or woman must be twenty-one to make a will either of personalty or of realty. In other States the statute draws a distinction between wills of personalty and wills of realty, the testator being required to be twenty-one to dispose of lands, while one of eighteen may dispose of goods, or some other difference of age is prescribed. In some States both personal and real estate may be disposed of by persons eighteen years of age.

Mental capacity is of course required in all cases. But legal theory tends more and more against restrictions based upon grounds of mental condition in persons not idiotic. Testamentary capacity requires no more than that the testator, when executing his will, is able to comprehend the following facts: the property he is about to dispose of, the natural objects of his bounty, the meaning of the business in which he is engaged in making his will, the relation of each of these facts to the others, and the dispositions made by his will.¹

It was at one time laid down that a person deaf, dumb, and blind from birth had not capacity to make a will.² But we know more to-day about such persons than was known even fifty years ago. Mental soundness is not necessarily wanting, it is now known, simply because

¹ Westcott v. Sheppard, 51 N. J. Eq. 315; s. c. Hampton v. Westcott, 49 N. J. Eq. 522; Whitney v. Twombly, 136 Mass. 145.

² Coke, Litt 42 b; Jarman, Wills, 35.

one has always been deaf, dumb, and blind. Capacity to understand sufficiently for the purpose of making a will may well be present, and sound methods of education have shown it to be present in particular cases. The consequence is that inquiry should be allowed in every case of the execution of a will by such a person to show whether, as a matter of fact, he had the required capacity. At the most, in reason, there can be no more than a *prima facie* presumption of want of capacity in the testator. But such presumption there probably is.

It follows, a *fortiori*, that blindness does not constitute incapacity to make a will; all that the courts require for allowing probate of a will of one blind is satisfactory evidence that the testator ^{Blindness.} knew and approved of the contents of the instrument,¹ as, for instance, that the contents of the will were properly read over to him.² Of course, too, inability to read is no evidence of testamentary incapacity; as in the case of blind testators, it is only necessary, in regard to the testator's inability to read, to make it plain to the court that he understood the contents of the will.³

Passing from cases of infirmity of the senses which inform the brain to the brain itself, that is, to the real seat of capacity for thinking, it is to be observed of the subject as a whole that tes- ^{Capacity a relative thing.} tamentary capacity has come to be looked upon as a

¹ In re Axford, 1 Swab. & T. 540.

² *Fincham v. Edwards*, 3 Curteis, 63; *Weir v. Fitzgerald*, 2 Bradf. 42; *Wampler v. Wampler*, 9 Md. 540; *Martin v. Mitchell*, 28 Ga. 382.

³ *Guthrie v. Price*, 23 Ark. 396; *Day v. Day*, 2 Green, Ch. 551. Reading the will to the testator is perhaps the most satisfactory way of making the will known to him, but he may know it in other ways. See *Worthington v. Klemm*, 144 Mass. 167.

relative thing; it is to be considered with reference to the particular will in question, — the question being, not whether the testator had capacity for will-making, but whether he had capacity to make the will in suit. He may have had capacity to make that will, and yet not have had capacity to make a more complex one; or he may not have had capacity to make the will in suit, and yet have had capacity to make a less complex or different one.¹ Whether he understood the particular thing he was doing is the question.

The requirement even then is not of the highest; the law is satisfied with a moderate degree of capacity. The Extent of capacity. testator may be subject to serious infirmities affecting, more or less, his mental vigor, and yet be equal to making his will.² Weakness from age, disease, and inebriety³ or other causes may indeed be extreme, and yet not create incapacity.⁴ Testamentary capacity calls for soundness of mind, not soundness of body, except as the willing brain is part of the body. Wills have been upheld where the testator was of great age, very deaf and nearly blind, or had the palsy so that he could neither write nor feed himself.⁵

Indeed the law does not require so much as average

¹ *Campbell v. Campbell*, 130 Ill. 466; *Jarman, Wills*, 61, note by the present writer, from which much of the text in this connection is taken.

² *Bannister v. Bannister*, 45 N. J. Eq. 702; *Westcott v. Sheppard*, 51 N. J. Eq. 315, 318.

³ *Koegel v. Egner*, 54 N. J. Eq. 623; *Fluck v. Rea*, 51 N. J. Eq. 233; *Peck v. Cary*, 27 N. Y. 9, 23; *Miller's Estate*, 179 Penn. St. 645, 652.

⁴ *Westcott v. Sheppard*, *supra*; *Stoutenburgh v. Westbrook*, 43 N. J. Eq. 597; *Lewis's Estate*, 140 Penn. St. 179.

⁵ *Lowe v. Williamson*, 1 Green, Ch. 82; *In re Reed*, 2 B. Mon. 79. See *Taylor v. Pegram*, 151 Ill. 106; *Pooler v. Cristman*, 145 Ill. 405, 410; *Denning v. Butcher*, 91 Iowa, 425; *Maddox v. Maddox*, 114 Mo. 35, 47.

capacity; there is no such term in the law of testamentary capacity as 'the average man.' For it may not require the capacity of the average man to understand and make the will in question. A man may have capacity to make his will without having capacity to transact ordinary business,¹ or (it has been said) to make a contract.² Even weakness of mind is not necessarily fatal,³ though of course it is likely to be. Nay, weakness or disease of mind in a testator may amount to insanity, and yet not constitute incapacity to make the will in question; in the language of the law of wills, the testator may still have a 'disposing' mind.⁴ There may accordingly be 'partial eclipse' of mind and yet ability sufficient for the particular will.⁵ It is clear, too, that 'moral insanity' does not constitute incapacity.⁶ Of course the fact that a will disposes of property unnaturally and unjustly does not show want of capacity; though with evidence which does indicate incompetency it may be considered.⁷

¹ *Whitney v. Twombly*, 136 Mass. 145; *Delaney v. Salina*, 34 Kans. 532; *Sinnet v. Bowman*, 151 Ill. 146.

² *Maddox v. Maddox*, 114 Mo. 35; *Jackson v. Hardin*, 83 Mo. 175; *Kramer v. Weinert*, 81 Ala. 414; *Meeker v. Meeker*, 74 Iowa, 352. But see *Davis v. Calvert*, 5 Gill & J. 269, 299, 300.

³ *Whitney v. Twombly*, 136 Mass. 145; *Schneider v. Manning*, 121 Ill. 376; *Westcott v. Sheppard*, 51 N. J. Eq. 315; *Delafield v. Parish*, 25 N. Y. 9, 27; *Stewart v. Lisenard*, 26 Wend. 313.

⁴ *Schreiner v. Schreiner*, 178 Penn. St. 57; *Campbell v. Campbell*, 130 Ill. 466; *Durham v. Smith*, 120 Ind. 463; *Hovey v. Chase*, 52 Maine, 304.

⁵ *Thomas v. Carter*, 170 Penn. St. 272; *McCulloch v. Campbell*, 49 Ark. 367; *Middleditch v. Williams*, 45 N. J. Eq. 726. See below as to the mind as a supposed unit. Inebriety long continued and resulting sometimes in temporary insanity does not require proof of lucid intervals to give validity to a will of the drunkard. *Koegel v. Egner*, 54 N. J. Eq. 623, 627; *Peck v. Cary*, 27 N. Y. 9, 23.

⁶ *In re Jones*, 25 N. Y. Sup. 109.

⁷ *In re Wilson*, 117 Cal. 262; *In re Langford*, 108 Cal. 608; *Mid-*

Weakness of memory may be taken in illustration. Now it is clear that the mental or psychic processes, by which what are called the 'images of memory'¹ are created and called up, may be sound notwithstanding difficulty in calling up the images, or forgetfulness; the images may have been indistinct, they may have faded out entirely, or though intact they may, when called up, be displaced by other images of memory competing for first place. There is no mental disease at all in such cases.² Thus while a testator must have ability to recall, in general, the natural objects of his bounty, if he has any, still it is unnecessary that he should be able to call up the names of all such persons, where there are several, or even that he should be able to call to mind all the persons, regardless of their names.³

dleditch v. Williams, 45 N. J. Eq. 726; *Smith v. Smith*, 48 N. J. Eq. 566, 591; *Nicewander v. Nicewander*, 151 Ill. 156.

¹ The expression 'images of memory' is in common use, and is here used as a convenient designation of what, considered as the effect produced in the brain by sensation, is the trace or impression created by the sensation. 'A trace of the cortical excitation that has taken place is left in the cerebral cortex.' Ziehen, *Physiological Psychology*, 151 (Tr. London, 1892). The impression or trace is not an 'image,' in the sense of a copy or counterfeit representation of the cause of the sensation, but a change made in the memory-cell itself; this never fully returns to its previous state. *Id.* 152. Nor is what is called up in memory from the trace an image in the sense mentioned. *Id.*

² Under fatigue there may not be vigor enough to call up the latent 'image.' But the condition is of course only transitory, and rest will generally give the required vigor. On such matters see Ziehen, *ut supra*, 220.

³ *Kramer v. Weinert*, 81 Ala. 414; *Clifton v. Clifton*, 47 N. J. Eq. 227, 241. See *Montague v. Allan*, 78 Va. 592; *Converse v. Converse*, 21 Vt. 168. The contrary is true of course where the nerve-paths, or media, of memory have been broken up so as not to respond to any normal stimulus, such as prompting. Such condition is sometimes spoken of as 'total failure' of memory. *Taylor v. Pegram*, 151 Ill. 106, 119, 120.

The law of wills goes further than that; it admits of clear weakness of memory. A man's memory may be actually much impaired by age or disease; it may not be equal to recalling the names, the persons, or the families with whom he has been well acquainted; a man may repeat the same question at short intervals after being answered, or repeat himself in other like ways, and yet be able to make his will even where memory plays some important part in the will.¹ The law requires, however, a 'disposing' memory, which appears to mean a memory which, for the purpose in question, is a reasonably safe guide.

It must, however, be observed that there may be failure of memory which will affect the will, though the failure may not be a matter of testamentary capacity at all, even in the particulars in which the will is affected. A man may have a perfectly sane and disposing memory, and yet forget a fact the forgetting of which may seriously disturb the dispositions made in the will; this, not because there is a want of 'disposing' memory, but simply because the testator forgot a material fact. Failure to mention a child of the testator affords an example. The will is not void in such a case, as it would be if the testator lacked capacity, but in some States it is presumed that the child was forgotten, not intentionally cut off, and hence he is let into a share in the estate. The will must be disturbed accordingly.

It was at one time considered in England that insanity in one particular was enough to show want ^{Partial} of capacity in general, on the ground sup- ^{insanity.} posed that the mind is a unit, and hence, that if there be

¹ See *Kinne v. Kinne*, 9 Conn. 105; *Rambler v. Tryon*, 7 Serg. & R. 95; *Converse v. Converse*, 21 Vt. 168.

unsoundness at all it must affect the whole mind.¹ But that doctrine is considered to have been founded in mistake, and has been abandoned.² It is now everywhere held that insanity not in the line of the dispositions of the will is not fatal.² Thus subjective delusions generally show insanity; but insane delusions may exist in the mind of a testator without touching or affecting his capacity to make the will in question.³ To show want of capacity, the insane delusions must touch the will itself.⁴

Subjective delusion is delusion arising wholly within the mind, or, at any rate, not arising from and agreeing with any sensation caused by an external or normal stimulus.⁵ It manifests itself in hallucinations, and presumptively shows mental disease.⁶

¹ *Waring v. Waring*, 6 Moore, P. C. 341; *Smith v. Tebbitt*, L. R. 1 P. & D. 398.

² *Banks v. Goodfellow*, L. R. 5 Q. B. 549; *Smee v. Smee*, L. R. 5 P. & D. 84; and cases in next note.

³ *Schreiner v. Schreiner*, 178 Penn. St. 57; *Thomas v. Carter*, 170 Penn. St. 272; *Young v. Miller*, 145 Ind. 652; *Burkhart v. Gladish*, 123 Ind. 337; *Kingsbury v. Whitaker*, 23 La. An. 1055; *In re Redfield*, 116 Cal. 637; *Brown v. Ward*, 53 Md. 376; *Rice v. Rice*, 53 Mich. 432; *Fraser v. Jennison*, 42 Mich. 208; *Middleditch v. Williams*, 45 N. J. Eq. 726; *Denson v. Beazley*, 34 Texas, 191; *Cotton v. Ulmer*, 45 Ala. 378; *Evans v. Arnold*, 52 Ga. 169.

⁴ *Schreiner v. Schreiner*, *Thomas v. Carter*, *Cotton v. Ulmer*, and other cases just cited.

⁵ See *Smith v. Smith*, 48 N. J. Eq. 566; *Taylor v. Trich*, 165 Penn. St. 586.

⁶ 'In this case' of hallucination 'not only the adequate external stimulus' which produces sensation (e. g., a sound) 'but also the primary sensation are wanting. The person subject to hallucination sees persons and landscapes in the cloudless sky, and hears voices in the most profound stillness.' Ziehen, *Physiological Psychology*, 227. But hallucinations may arise without mental disease, especially in cases of inherited tendency. 'An exact investigation of this subject shows that . . . many individuals who have inherited tendencies towards mental diseases, al-

The fact that a man reasons incorrectly, or that he holds beliefs which most men or even all other men repudiate, is a different thing. Such things are deemed consistent with mental soundness, to the extent of capacity for making the person's will, of whatever nature it may be. A man's reasonings or beliefs may be delusion, and yet not subjective delusion, for they may still be based upon facts or possible facts, i. e., they may arise from an external or normal stimulus. Such delusion, which may be called objective, can at most only be *evidence* when supported by other facts of insanity;¹ standing alone it would probably be no evidence at all on the point. Belief in the phenomena of spiritualism, for instance, is no evidence of mental unsoundness;² and the same may be said of all other peculiar beliefs which do not spring up within the brain as hallucinations.³

What affirmatively constitutes testamentary capacity

though not mentally deranged themselves, experience hallucinations. Of still greater importance to us is the fact that even men who are very gifted mentally, particularly artists who possess a very vivid imagination, have hallucinations.' Ziehen, p. 231. Perhaps this is the kinship of genius with madness.

Illusion, produced as it is by true external stimulus but not agreeing with it, as where the sighing of the wind creates the sensation of speech, is said to be of frequent occurrence and to appear in connection with all the senses. This, too, appears to be due in most cases to mental disorder. 'The memory-cells, as it were, add certain hallucinatory elements to the sensations. . . . It should be carefully noted, however, that these are not merely cases of mistaken or deceived judgment. . . . The quality of sensation itself is directly changed.' Ziehen, p. 233.

¹ *Middleditch v. Williams*, 45 N. J. Eq. 726; *In re White*, 121 N. Y. 406.

² *Otto v. Doty*, 61 Iowa, 23; *Brown v. Ward*, 53 Md. 376; *In re Smith*, 52 Wis. 543; *In re Spencer*, 96 Cal. 448; *Whipple v. Eddy*, 161 Ill. 114.

³ *Denson v. Beazley*, 34 Texas, 191; *Taylor v. Trich*, 165 Penn. St. 586, 591; *Thompson v. Quimby*, 2 Bradf. 449.

may on the whole be put thus: Soundness of mind for the purpose of making a will has relation to the business to be done. The mind must be sound in reference to whatever the particular will involves; that is, the testator must be *able* to understand and carry in mind, in a general way, the nature and situation of his property and his relation to the persons around him, to those who would naturally have some claim upon his remembrance, to those persons in whom and those things in which he has been mostly interested. He must, in other words, be able to understand the nature of the act he is doing, and the relation in which he stands to the objects of his bounty and to those who ought to be in his mind upon such an occasion, free from any delusion, the effect of disease, which might lead him to dispose of his property otherwise than he would if he knew and understood correctly what he was doing.¹ And the one who propounds the will for probate must show by clear evidence that the testator fully understood the nature and contents of the instrument.² If the testator was insane, it must be shown that the will was made in a lucid interval, and clearly understood by the testator, unless it appears that the insanity was not along the line of the will.³

¹ *Whitney v. Twombly*, 136 Mass. 145; *Hoopes's Estate*, 174 Penn. St. 373, 379; *Miller v. Oestrich*, 157 Penn. St. 264; *Westcott v. Shepard*, 51 N. J. Eq. 315, 319.

² *Hildreth v. Marshall*, 51 N. J. Eq. 241, 250.

³ *Hoopes's Estate*, 174 Penn. St. 373; *Taylor v. Trich*, 165 Penn. St. 586, 591.

CHAPTER VIII.

'VOLUNTARY DISPOSITION.'

THE will must, of course, be the will of the person who executes the instrument; which means that it must have been his free or voluntary act. Now one's Freedom of freedom of action may be taken away either action. by coercion or by what is called undue influence. Of coercion, otherwise called duress, it is not necessary particularly to speak, for it is obvious enough that if I sign an instrument under the orders of another it is not my own free act. It is my act in a sense, and my intended act (if the very muscles of my hand were not compelled by external force applied to them), for it must have been the result of motives within my own mind — the stronger motive has prevailed; but that does not make the act my free act as the law defines freedom of action. Legally speaking, the act is not my act — the will is not my will.¹

Undue influence is a much more subtle thing, and calls for particular consideration.² The term must Undue be kept distinct from that of testamentary influence. capacity, with which it is often closely connected.³

¹ The student of psychology may need this warning against applying to the case the facts, that is, the mental processes, which that science shows to be in operation.

² A note of the present writer in Jarman on Wills, p. 66, forms the substance of what follows.

³ *Armor's Estate*, 154 Penn. St. 517.

The two are different things; undue influence may have been exercised upon one whose mental capacity was ample,¹ and, on the other hand, if there was want of capacity it makes no difference whether undue influence was exercised or not. Still the two may be so closely connected as to be inseparable.²

As in the case of testamentary capacity, however, the question of undue influence is a relative thing, to be considered in the concrete. The question to be considered is whether the influence brought to bear in the particular case was undue with regard to this testator.³ What might be undue towards one man might not be undue towards another; the supposed testator may not have had the strength of mind to resist where another would have had.⁴ And that, too, without affecting his testamentary capacity.

But while the question of capacity must not be confused with that of undue influence, the testator's state of mind and body, at the time of making the will, may be and often is a material subject for consideration in determining whether undue influence has been exercised upon him.⁵ What, for instance, would be undue influence upon a person in feeble health might not be undue if the same person were perfectly well. And where capacity is feeble, influence finds its opportunity.

¹ See *Westcott v. Sheppard*, 51 N. J. Eq. 315, 320.

² *Armor's Estate*, *supra*.

³ *Shailer v. Bumstead*, 99 Mass. 112, 121.

⁴ *Griffith v. Diffenderffer*, 50 Md. 466, 480; *Mooney v. Olsen*, 22 Kans. 69.

⁵ *Shailer v. Bumstead*, *supra*; *Westcott v. Sheppard*, 51 N. J. Eq. 315, 320.

The test to be applied accordingly is this: Was the influence such as to take away, that is, *did* it take away the testator's free action in this instance?¹ Free action, the Whatever influence constrains a person to test. do what is against his will, and what he would not do if left to himself, is undue influence, however the control is exercised.² It is sometimes said that influence, to be undue, so as to defeat a will, must amount to force or coercion.³ But this is rather too strong a statement if ‘force’ and ‘coercion’ are to be taken in the ordinary sense. The will may be overcome by gentle and insidious means as well as by violence, and that is the usual course in cases of undue influence. The testator need not even have been under the control of another to have been unduly influenced by him.⁴

¹ *Conley v. Nailor*, 118 U. S. 127; *Ormsby v. Webb*, 134 U. S. 47; *Gurley v. Park*, 135 Ind. 440; *Lyons v. Campbell*, 88 Ala. 462; *Peery v. Peery*, 94 Tenn. 328; *Westcott v. Sheppard*, 51 N. J. Eq. 315, 320; *Bennett v. Bennett*, 50 N. J. Eq. 439; *Stewart v. Jordan*, id. 733; *Carroll v. House*, 48 N. J. Eq. 269; *In re Kaufman*, 117 Cal. 288; *Schofield v. Walker*, 58 Mich. 96; *In re Nelson*, 39 Minn. 204; *Myers v. Hanger*, 98 Mo. 433; *In re Snelling*, 136 N. Y. 515; *In re Martin*, 98 N. Y. 193; *Lewis's Estate*, 140 Penn. St. 179; *Wise v. Foote*, 81 Ky. 10; *Chappell v. Trent*, 90 Va. 849.

² *Carroll v. House*, 48 N. J. Eq. 269, 273.

³ *Seguine v. Seguine*, 3 Keyes, 663, 669; *Gardiner v. Gardiner*, 34 N. Y. 155, 162; *Coit v. Patchen*, 77 N. Y. 394; *Morris v. Stokes*, 21 Ga. 552.

The term ‘moral coercion’ is sometimes used; the influence, it is said, must amount to physical or moral coercion. *Westcott v. Sheppard*, 51 N. J. Eq. 315, 320; *Hampton v. Westcott*, 49 N. J. Eq. 522. This is well enough when it is explained that ‘moral’ coercion may be much less than physical coercion. In the case first cited it was well said that importunity may amount to coercion. See also *Elkinton v. Brick*, 44 N. J. Eq. 154, 166.

A person cannot be unduly influenced to do what it is his legal duty to do. *Bennett v. Bennett*, 50 N. J. Eq. 439.

⁴ See *Boyse v. Rossborough*, 6 H. L. Cas. 2, 51, where it is said that control imports something of the nature of duress or fear, while definiteness of that kind cannot be predicated of undue influence.

The case of undue influence comes to this, that the testator is practically the instrument by which a stronger person has effected his desire. The supposed will is not the will of the testator in the sense which the law requires. It is not to be supposed, however, that yielding to another is yielding to undue influence; influence is not undue until it dominates the action of the person affected by it. Thus successful persuasion does not establish undue influence; one may be persuaded without being dominated by another; and yet importunity *may* amount to undue influence.¹

The distinctions in the case of persuasion by a wife have, in substance, been put thus: If a wife create in the mind of her husband unfounded prejudices against the natural objects of his bounty, and contrive to keep him away from them, so that the false impressions thus created may not be removed, and are not removed at the time of making the will, which is, in fact, made under such circumstances, undue influence may be considered to have been exercised.² But this will not be true of successful persuasion, even while the testator is at the point of death, to induce him to make a better provision for the wife than he is disposed to make, if it appear that the husband was of sound mind and was not imposed upon by false representations, and that the provision made in the will was not greatly disproportionate to that of near kindred, or unreasonable.³

Indeed, the fact that the testator may under such circumstances have given all his property to his wife in

¹ Westcott v. Sheppard, 51 N. J. Eq. 315, 320; Hindman v. Van Dyke, 153 Penn. St. 243.

² Boyse v. Rossborough, 6 H. L. Cas. 2.

³ Lide v. Lide, 2 Brev. 403.

preference to near kindred does not show undue influence on her part, for the testator might well think that it was his duty to do so.¹ Add to this that the wife usually exercised over her husband, in the general affairs of the family, a powerful influence, and yet no case of undue influence is made out. There should be evidence that she exerted her influence in a special degree to procure a will specially desired by her, to the prejudice and disappointment of others naturally expecting his favor.²

Such influence as that suggested in the last paragraph should perhaps be considered as lawful only in the case of a wife or a child. Influence of the kind ^{Influence of} would probably be undue if exercised by ^{mistress.} others; certainly it would be if exercised by a mistress of the testator, in prejudice of his family.³ Still a man may leave all his property which he has power to dispose of to his mistress to the prejudice of his wife, if he does it freely; though the fact that the person taking the benefit is his mistress should lead the court to scrutinize the case.⁴ The existence, however, of an unlawful relation between the testator and a beneficiary is not enough alone to justify a jury in finding undue influence.⁵

¹ See *Small v. Small*, 4 Greenl. 223.

² *Id.*

³ *Kessinger v. Kessinger*, 37 Ind. 341; *Denton v. Franklin*, 9 B. Mon. 28. See *In re Ruffino*, 116 Cal. 304.

⁴ *Arnault v. Arnault*, 52 N. J. Eq. 801. See *In re Ruffino*, 116 Cal. 304; *McClure v. McClure*, 86 Tenn. 173; *Munroe v. Barclay*, 17 Ohio, 302, 316; *Dean v. Negley*, 41 Penn. St. 312; *Main v. Rider*, 84 Penn. St. 225; *In re Mendorf*, 110 N. Y. 450. There is, however, no presumption that unlawful influence was exercised. *Arnault v. Arnault*, *supra*. See *infra*, p. 90.

⁵ *Johnson's Estate*, 159 Penn. St. 630; *Wainwright's Appeal*, 89 Penn. St. 225.

Undue influence may be exercised by one who is not a beneficiary under the will; a person might unduly influence a testator to make a bequest to a child, relative, or friend of such person, or to some object of charity.

Akin to cases of undue influence in some degree, but falling far below them in effect upon the will, are cases in which the will has been executed in favor, more or less, of a person standing in a fiduciary or confidential relation towards the testator. A fiduciary relation arises, it seems, wherever a trust, continuous or temporary, is specially reposed in the skill or integrity of another, or wherever the property or pecuniary interest in whole or in part, or the bodily custody, of one person is placed in charge of another.² For the protection of the one party the law requires but slight evidence, where it requires any, to raise a suspicion, or even a presumption,³ that transactions by which he confers upon the other a benefit, whether by contract, sale, gift, or will, have been unduly brought about by the person benefited. This suspicion, or presumption, if it appear to be raised, must be removed by the party resting under it before the courts will confirm him in his claim to the benefit.⁴

Among the relations which are called fiduciary are those of attorney and client, principal and agent, trustee and cestui que trust, guardian and ward, and executors

¹ See *In re Cahill*, 74 Cal. 52; *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 433.

² *Bigelow*, *Fraud*, i. 262.

³ See *Whitelaw v. Sims*, 90 Va. 588, 590; *Hartman v. Strickler*, 82 Va. 238; *Donnelly v. Broughton*, 1891, A. C. 435, 442.

⁴ *Id.*; *Mott v. Mott*, 49 N. J. Eq. 192 (deed).

or administrators and claimants of the decedent's estate. The doctrine applies to all these relations.

The case of a testamentary provision by a client in favor of his attorney may be taken in illustration. It seems that such provisions formerly were ^{Attorney and} not looked upon with the same degree of ^{client.} disfavor as gifts *inter vivos* by the client to his attorney. A testator made a provision in his will in favor of his solicitor for £1000, by which he wished to confirm a gift he had already made to him. There was evidence that before signing the will, which had been drawn by the client, a third person who was an old friend of the testator had attended and read over the will and had then asked if the disposition of property was such as the testator wished; to which the testator replied in the affirmative, adding that he would have done more for his solicitor if the solicitor would have permitted. The evidence was held sufficient to remove all doubt that the provision had been properly obtained, and it was accordingly upheld.¹

It is clear, then, that a testamentary gift to an attorney is not void even though he wrote the will; at most it is but voidable.² But the burden lies in every case of the kind upon the beneficiary ^{Draftsman of} to satisfy the court that the instrument is ^{will taking} the last will of a free and competent testator. ^{gift.} Indeed, if a person but writes or prepares a will, under which he takes a benefit, that is deemed to be a fact to excite the suspicion of the court, and to cause the court to be

¹ *Hindson v. Weatherill*, 5 DeG. M. & G. 301.

² *Post v. Mason*, 91 N. Y. 539; *Riddell v. Johnson*, 26 Gratt. 152; *Cramer v. Crumbaugh*, 3 Md. 491; *Watterson v. Watterson*, 1 Head, 1.

zealous in examining the evidence in support of the instrument; in favor of which it ought not to pronounce unless the suspicion is removed and the court satisfied that the instrument does express the true will of the testator.¹

But the most that has been required in such cases is satisfactory evidence that the testator was of sound mind and clearly understood the contents of the will, and was at the time under no restraint. No authority has gone so far as to declare a will invalid where it was shown that the testator was of sound mind and clearly understood what he was doing, though the will was drawn by the person who under it took the whole estate of the testator.² The burden, however, may be increased by circumstances, such as unbounded confidence in the draftsman of the will, extreme weakness in the testator, secrecy, and the like; the facts being such as to make a conclusive case against the validity of the gift.³

It is not, however, conclusive against the validity of the gift to the draftsman of a will that the testator was at the time of executing the instrument a person of weak mind. In an English case it appeared that the testator was a person of small capacity, of retiring disposition, indolent habits, addicted to drinking, singular in his appearance, frivolous, and even childish at times in his amusements and occupations. But there was no evidence to show that he was insane, or that he lacked capacity to make a will. Indeed, it was not disputed on the one side that he was

Evidence required to satisfy the court.

Weakness of testator in such cases.

¹ Post *v. Martin*, and *Riddell v. Johnson*, *supra*.

² See the cases last cited; also *Donnelly v. Broughton*, 1891, A. C. 435, 442.

³ *Donnelly v. Broughton*, *ut supra*.

of testamentary capacity, or on the other that he was of weak mind. The court declared that the only consequence was, to add to the suspicion against the draftsman, who was also solicitor to the testator, and was to take no less than a fourth part of the estate, and to call upon the court to watch the proof of the will with increased jealousy.¹

The foregoing remarks represent the doctrine which formerly obtained very generally, and still obtains in England and in some of our States, a presumption, or, at least, a suspicion, of wrongdoing arising because of the relation of trust or confidence.² But many of our authorities appear to stop short of such doctrine as too strong. It seems now to be widely held that the existence of a fiduciary or confidential relation with the devisee or legatee, though he be a stranger in blood and the subject of a large gift, is not alone enough to compel him to make good the gift;³ unless he drew the will — which fact appears to be enough.

Relation of confidence not enough by many authorities.

No case affecting the will is made by any of the authorities where the confidential relation involves no superior rights or knowledge, both parties to the relation standing upon the same footing, as in the case of a bequest to one's

Confidence, without superiority: family relation.

¹ *Barry v. Butlin*, 1 Curteis, 637. See also *Harvey v. Anderson*, 12 Ga. 69.

² *Paske v. Ollat*, 2 Phill. 323; *Donnelly v. Broughton*, 1891, A. C. 435, 442; *Dale's Appeal*, 57 Conn. 127; *Richmond's Appeal*, 59 Conn. 226; *Gay v. Gillilan*, 92 Mo. 250; *Bridwell v. Swank*, 84 Mo. 455.

³ *Bancroft v. Otis*, 91 Ala. 279 (overruling *Moore v. Speer*, 80 Ala. 129, and following *Lyons v. Campbell*, 88 Ala. 462); *In re Smith*, 95 N. Y. 576; *Wheeler v. Whipple*, 44 N. J. Eq. 141; *Waddington v. Buzby*, 43 N. J. Eq. 154; s. c. 45 N. J. Eq. 173. See also *Marx v. McGlynn*, 88 N. Y. 357; *Lewis's Estate*, 140 Penn. St. 179.

partner in trade,¹ at least where the testator is an active partner. The relation of husband and wife, or perhaps of members of the same family, would also afford illustration. Clearly, the fact that an adult son, to whom his mother has left all or the greater part of her property, was living with his mother, creates no such relation of confidence as that under consideration.² But it is held that if, of two sons, one is in a position to exercise improper influence over his mother, in a case in which the mother, being of feeble mind, leaves nearly all her property to him, without apparent reason for the discrimination, he must make good his claim to the gift.³ So it is held in the case of a woman to whom or to whose child the testator has left all his property, and with whom the testator has lived as her husband, though he was not, that no presumption or evidence of undue influence arises from the facts.⁴ But the difference between such a case and that of living or consorting with a mere mistress may be very slight; and the law certainly looks with suspicion upon testamentary gifts to a mistress.⁵

According to the authorities which seem to have departed from the earlier rule, there should, as we have said, be something more than a gift to the party in the superior position of confidence. There should be some such fact as feebleness of mind in the testator, or activity on

- ¹ In re Brooks, 54 Cal. 471.

² Dale's Appeal, 57 Conn. 127; In re Martin, 98 N. Y. 193.

³ Dale v. Dale, 38 N. J. Eq. 274. Compare Foster's Appeal, 142 Penn. St. 62.

⁴ Porschett v. Porschett, 82 Ky. 93; Main v. Ryder, 84 Penn. St. 217; Wainwright's Appeal, 89 Penn. St. 222; Dickie v. Carter, 42 Ill. 376.

⁵ Ante, p. 85; Arnault v. Arnault, 52 N. J. Eq. 801, 805; Kessinger v. Kessinger, 37 Ind. 341; Denton v. Franklin, 9 B. Mon. 28; Layman

the part of the legatee or devisee in and about the preparation or execution of the will, as by initiating proceedings for it, the employment of a draftsman, selecting the witnesses, excluding persons from the presence of the testator at or about the time of executing the will, or concealing the will itself after it has been made,¹ or the fact that the legatee or devisee himself drew the will.² It seems that the fact that the legatee or devisee, being a stranger, drew the will, would require him to satisfy the court, though he had not been in a confidential relation towards the testator.³

But whatever the added facts, if on the whole evidence neither undue influence nor fraud appears to have been exercised, the gift will stand.⁴ The existence of a fiduciary or confidential relation, Presumption of suspicion removed. with superiority of rights, position, or knowledge, and the further fact that the legatee or devisee drew the will, works no disqualification.⁵

A draftsman of the will may not stand in any relation of confidence towards the testator further than is involved in the matter of drawing the will; though it Draftsman of will. often happens that he does stand in such relation independently of his situation as draftsman. But the only effect at most is to require greater scrutiny

v. Convey, 60 Md. 286; *Dean v. Negley*, 41 Penn. St. 318; *McClure v. McClure*, 86 Tenn. 173; *In re Slinger*, 72 Wis. 22.

¹ *Bancroft v. Otis*, 91 Ala. 279; *Wheeler v. Whipple*, 44 N. J. Eq. 141.

² *Lyons v. Campbell*, 88 Ala. 462; *Waddington v. Buzby*, 43 N. J. Eq. 154; s. c. 45 N. J. Eq. 173; *Rusling v. Rusling*, 36 N. J. Eq. 603, 607.

³ *Lyons v. Campbell*, *supra*.

⁴ *Lewis's Estate*, 140 Penn. St. 179.

⁵ *Bancroft v. Otis*, and other cases, *supra*.

into the circumstances of the gift. When no further relation of confidence exists than is implied in employing a draftsman, the suspicion of undue influence, if the draftsman is a legatee or devisee, is probably weaker than in other fiduciary relations; but the authorities generally appear to hold that the suspicion arises.¹

It is not necessary, however, in order to require a devisee or legatee to make good the will, by showing that it was executed without undue influence in his favor, that the devisee or legatee should stand in a relation of legal confidence towards the testator, or that he should be the draftsman of the will. There may be other sufficient indication of suspicion, as that he generally dominated the testator, who was weak-minded, and that he took charge of the making the will; especially where the whole of the testator's estate was given to him in exclusion of others equally entitled to the testator's favor.² Any one may exercise undue influence.

Undue influence in other cases.

THE 'DISPOSITION.'

Emphasis must be put upon the word 'disposition' as well as upon the word 'voluntary,' in the general definition of a will. The 'disposition' must be such that the courts can enforce it. That suggestion, however, would lead to the consideration of questions (of certainty and lawfulness) which make too large a part of the law of wills to be treated under a mere definition of the word 'will.' Those subjects will accordingly be deferred for consideration to a later part of the book.

¹ Jarman, 70.

² *Boisaubin v. Boisaubin*, 51 N. J. Eq. 252. See *Waddington v. Buzby*, 16 Stewt. Eq. 154; *Stewart v. Jordan*, 50 N. J. Eq. 733.

CHAPTER IX.

'PROPERTY.'

THE power of testamentary disposition extends to all interests in real and personal estate, vested or contingent,¹ which at one's death would, if not disposed of by will, devolve upon one's heirs or personal representatives; and this as well where the testator is only the legal or only the beneficial owner as where he unites in himself both these characters.² And testacy is preferred as matter of law to intestacy, whether total or partial.³

This is an extension of the old law of wills in certain particulars. By that law rights of entry and rights of action, though descendible, could not be disposed of by will.⁴ Now, by statute, they may,⁵ the test being whether the interest is descendible. Such rights arise in various ways, as by breach of condition either in a freehold conveyance of land or in a

¹ *Cummings v. Stearns*, 161 Mass. 506 (vested interest in an equitable contingent remainder).

² *Jarman*, 48.

³ *In re Kimberly*, 150 N. Y. 90; *Schult v. Moll*, 132 N. Y. 122; *In re Miner*, 146 N. Y. 121, 131; *Lamb v. Lamb*, 131 N. Y. 227; *Boies's Estate*, 177 Penn. St. 190; *Le Breton v. Cook*, 107 Cal. 410; *Korf v. Gericho*, 145 Ind. 134, 136.

⁴ *Goodright v. Forrester*, 8 East, 564; 1 Taunt. 578 (right of entry); *Baker v. Hacking*, Cro. Car. 387, 405 (right of action).

⁵ *Waring v. Jackson*, 1 Peters, 571; *Varick v. Jackson*, 2 Wend. 166; *Whittemore v. Bean*, 6 N. H. 47; *Smith v. Bryan*, 11 Ired. 418; *Humes v. McFarlane*, 4 Serg. & R. 435; *Watts v. Cole*, 2 Leigh, 664.

leasehold interest, and upon a disseisin. These are plain cases for the operation of a will. Thus a landlord having a right to enter upon his tenant for term of years, and put an end to the lease for condition broken, may devise the right to another.

But certain cases of breach of condition must be distinguished. When upon the conveyance of an estate in land a 'condition' restraining the mode of use of the land is annexed, such condition being either for the benefit of other land owners or of the grantor himself, the 'condition' is treated as creating a trust for the beneficiary. It is not a true condition, giving a right of entry upon a breach, but gives to the beneficiary the right in equity to compel observance of the provision. The same thing would come about by a devise of land upon such terms. The consequence is that neither the grantor nor his heir in the first case, nor the heir of the devisor in the second, has any right of entry to devise.¹

Possession, too, even though wrongful, not, however, being feloniously obtained, is a thing which the possessor can dispose of by will against all persons except those having a superior claim. The devisee or legatee can defend or recover

¹ *Attorney-Gen. v. Wax Chandlers' Co.*, L. R. 6 H. L. 1; *Wright v. Wilkin*, 2 Best & S. 232, 252; *Stanley v. Colt*, 5 Wall. 119; *Ayling v. Kramer*, 133 Mass. 12; *Sohier v. Trinity Church*, 109 Mass. 1, 19; *Cunningham v. Parker*, 146 N. Y. 29, 33.

In *Ayling v. Kramer*, *supra*, a conveyance of land to M. A. Carter, was 'subject to the following conditions,' to mention one of them: 'No dwelling-house or other building except necessary out-buildings shall be erected or placed on the rear of the said lot.' The court were of opinion 'that the so-called conditions in the deed to Carter were not intended or understood by the parties to be technical conditions a breach of which would work a forfeiture of the estate. They . . . are to be construed as restrictions.' On the history of the subject see *Gray, Perpetuities*, § 282, note.

possession against all competing claimants not founding their claim upon or under title.¹

Joint tenancy is subject, so far as it still retains its common-law characteristic, to survivorship; that is, upon the death of one of the joint-tenants the other or others become entitled to the interest of the decedent. And the right so acquired is superior to any claim as devisee or legatee of the deceased co-tenant. It follows that, in the event of the death of one of the tenants in the lifetime of another, any attempt of the former to dispose of his interest by will must be fruitless. If, however, the testator survive his associate (or *all* of his associates if there be several), the disposition will be good regardless of the fact that it was made in the lifetime of the latter; for under modern legislation it is enough that the testator had an interest capable at his death of being disposed of by will.²

Joint tenancy :
tenancy in
common.

No such difficulty arises in cases of tenancy in common; in such cases each of the co-tenants has a sole estate, and hence has power to dispose of the same by will, notwithstanding the want of partition. The testator disposes of his undivided estate, his devisee or legatee being entitled to take his place in the co-tenancy.

An interest in real or personal property to arise in the future, called an executory interest, may be devised or bequeathed,³ if the contingency upon which it depends is such that the interest does not come to an end with the life of the testator; for it will

Executory
interests.

¹ Jarman, 50.

² Jarman, 48. See, further, chapter 23, at end, 'Taking per capita or per stirpes.'

³ *Cummings v. Stearns*, 161 Mass. 506.

then be descendible, which, as we have seen, is enough. A bare possibility, such as an heir apparent as such has, is a different thing; an heir has no legal or equitable right in his ancestor's estate during the latter's lifetime, and hence has nothing in it to devise.

It matters not that the contingency or condition is such that it cannot be ascertained at the time of the testator's death that he will take the contingent interest. But there is one important limitation to the validity of contingent dispositions of property; they must not violate what is called the rule against perpetuity. This term 'perpetuity' has two meanings, the word sometimes being used in the one sense, sometimes in the other; and sometimes there is more or less confusion in its use between the two meanings. The first meaning is perhaps the more natural one; a gift is in perpetuity when the interest given is to be inalienable by the legatee or devisee. The second meaning is a technical and legal one; a gift is in perpetuity, and hence invalid, when the interest given is so given that it might possibly not vest¹ until after the expiration of a life or lives in being and twenty-one years and a fraction — the period of gestation. More precisely, according to this technical meaning of the term, 'no interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within twenty-one years,' and a fraction, 'after some life in being at the creation of the interest.'² This rule came into

¹ In *re Wood*, 1894, 3 Ch. 381, 385 (gift to a child living when certain gravel pits were worked out, held too remote); In *re Dawson*, 39 Ch. D. 155; In *re Strathenden*, 1894, 3 Ch. 265.

² Gray, *Perpetuities*, § 201. The rule appears in a modified form as statute law in some of our States, as that the future estate must not be postponed beyond two lives in being at the time of creating it.

The state of things existing at the death of the testator, and not at

existence as judge-made law in the latter part of the seventeenth century, in consequence of the doctrine which now (contrary to earlier law) had come to obtain, that future contingent interests in property might be created. The creation of future freehold interests had not been possible before the Statute of Uses, because of the requirement of livery of seisin in such cases; but that statute having dispensed with the necessity of livery, estates to begin in futuro accordingly became possible. When later it came to be established that such estates might be made dependent upon a condition precedent, the courts deemed it necessary to restrain the creation of contingent future estates within reasonable limits of time, and the rule against perpetuities above stated was slowly, step by step, evolved.¹ The rule belongs, however, to the law of property, being applicable as well to conveyances inter vivos as to wills, and therefore will not be further considered here.²

By the common law, wills of realty operated, as we have seen, as conveyances, taking effect, therefore, only upon property which the testator held at the time of making the will; and this, whatever ^{After-acquired} interests. the language of the testator. Equity followed the law in this respect, and equitable interests accordingly fell

the date of the will is to be regarded in determining whether a gift contravenes the rule or not. In *re Wood*, 1894, 3 Ch. 381, 385.

¹ The whole process is shown in detail by Mr. Gray in his able work on Perpetuities.

² The following are recent cases on the subject: *Goodier v. Edmunds*, 1893, 3 Ch. 455 (trust for sale); In *re Dameron*, id. 421 (trust for sale); In *re Abbott*, 1893, 1 Ch. 54 (limitations in default of appointment under power void for remoteness); In *re Bence*, 1891, 3 Ch. 242 (as to splitting up gifts over, so as to save them); *Hale v. Hobson*, 167 Mass. 397 (residuary clause, contingent); *Hobson v. Hale*, 95 N. Y. 588 (same will as the last); *Hale v. Hale*, 125 Ill. 399 and 146 Ill. 277; *Allen v. Allen*, 149 N. Y. 280; *Bird v. Pickford*, 141 N. Y.

under the operation of the same rule. Thus, at common law, if a testator devised all the land of which he should die seised, even declaring specifically that it was his intention that all the real estate he should *thereafter* purchase should pass, and after the execution of his will acquired new lands, these would not pass by the will, but would descend as if no will had been made.¹ But statute has changed the rule, and after-acquired interests in realty may now be disposed of by will. The question is only one of intention.² After-acquired personalty could always be disposed of by will; even chattels real, that is, chattel interests in land, such as leasehold interests for years, could always be devised.³

18, 21; *Tilden v. Green*, 130 N. Y. 29; *Siddall's Estate*, 180 Penn. St. 127; *Weinbrenner's Estate*, 173 Penn. St. 440; *Walker v. Lewis*, 90 Va. 578; *Beurhaus v. Cole*, 94 Wis. 617; *Hughes v. Hughes*, 91 Wis. 138; *Trufant v. Nunneley*, 106 Mich. 554; *Hamlin v. Mausfield*, 88 Maine, 131; *St. John v. Dann*, 66 Conn. 401; *Woodruff v. Marsh*, 63 Conn. 125; *Jocelyn v. Nott*, 44 Conn. 55; *Fowler v. Duhme*, 143 Ind. 248; *Lawrence v. Smith*, 163 Ill. 149.

At common law the words 'without issue,' or 'leaving no issue,' or 'without leaving issue,' or the like, in a limitation to a gift of land to A, were construed to mean an indefinite failure of issue; hence any gift over to B upon such failure of issue would violate the perpetuity law and be void. See *Patterson v. Madden*, 54 N. J. Eq. 714, 716. But if the gift was of personalty, the words were construed to mean a failure of issue at the death of the first legatee, and so the gift might be good. *Id.* The words have been the subject of legislation in many States. On the various distinctions of the common law see the case just cited.

¹ *Girard v. Philadelphia*, 4 Rawle, 323. See *Brigham v. Winchester*, 1 Met. 390; *George v. Green*, 13 N. H. 521; *Carroll v. Carroll*, 16 How. 275; *Dodge v. Gallatin*, 130 N. Y. 117, 124.

² Statute in some of the States gives effect to devises upon after-acquired real estate, unless a contrary intention appears on the face of the will. See, e. g., *Flummerfelt v. Flummerfelt*, 51 N. J. Eq. 432. In other States real property after-acquired would not pass unless an intent to pass it appear on the face of the will. See chapter xix.

³ *Jarman*, 58, 59.

It is hardly necessary to say that the word ‘property’ in the definition of will includes equitable interests; these as well as legal interests devolve at death, in case of intestacy, upon the personal or the real representative according to their nature as personalty or realty, and that is the test of the law of disposition by will, as we have seen. Contracts for the purchase of land may be taken for illustration. Thus where a testator has a contract, enforceable by him, for the purchase of land, but not yet carried into effect by payment of the purchase-price, he has an equitable and descendible interest in the land, and accordingly he can dispose of it by will.¹ And he can so dispose of the interest subject to payment by the devisee of the purchase-price or freed from such charge, payment to be made, for instance, by the executor out of the personal estate.

If, however, the contract, though enforceable by the testator, is not enforceable against him, as, for instance, where the title is defective, a different case arises. Now the purchaser may elect to take the title, or he may not. If he should elect to take, he can dispose of the interest by will. But if he should not so elect, and should devise all his land to A, there would be no interest to pay to the devisee. The devisee could not say that he would take the interest, that is, the land, with its defects, the price to be paid for by the executor, or have the purchase-price laid out in buying for him another estate.

In other words, the situation of the devisee in such a case is to be treated as the same as that of the testator himself at the time of his death, unless a different intention appears on the face of the will. The deviser having never manifested any purpose of changing the position he was in, whereby he had the right either to insist upon

¹ Dodge v. Gallatin, 130 N. Y. 117, 124.

a good title or to refuse the estate, that is, having never indicated that he would have paid for the estate notwithstanding the defect of title, the devisee cannot insist upon taking it and call for payment out of the personal estate.¹

However, all this is what will pass in a disposition of land; it does not mean that the purchaser could not bequeath his own right to treat the contract as binding for whatever it might be worth.

¹ *Broome v. Monck*, 10 Ves. 597, Lord Eldon. The evidence of a purpose by the testator to take the estate with its defective title should probably be an acceptance of the title. *Jarman*, 53.

CHAPTER X.

‘COMPETENT’ BENEFICIARY.

It is not every object of one’s interest that can be made one’s devisee or legatee; for reasons differing more or less in each case the law limits the testator’s beneficiaries or the amount which he can give them. Corporations:
charitable
trusts.

By English legislation from the thirteenth century until within comparatively recent times corporations were made incompetent to hold lands, the statutes to that effect being known as Mortmain Acts. The supplementary or interpreting Statute of Wills, of the time of Henry the Eighth, expressly excepted from the right of testation devises to ‘bodies politic and corporate.’¹ Later came a famous statute of the reign of Elizabeth, declaring devises valid when made to a corporation for charitable uses.²

The last-named statute, however, was not an enabling act, giving corporations rights not before recognized; devises in trust for corporations were always deemed good in equity, before as well as after the Statute of Elizabeth. The Mortmain Acts had merely made corporations incapable of taking gifts in charity directly as devisees; whereas, if a trust were created equity considered that these acts did not apply. Where the uses

¹ 34 Hen. VIII. c. 5.

² 43 Eliz. c. 4.

were charitable and the deviser competent, equity would aid even a defective gift to uses.¹

This original jurisdiction of equity to enforce charitable trusts is a most important fact in this country.

Though the English Mortmain Acts have not been received into our legislation, still in many of our States corporations are by statute incapable of taking lands by devise. Now the Statute of Elizabeth has not been adopted into the legislation of these (if, indeed, in any of our) States; and the result would be, if the Statute of Elizabeth created new law, that in the States referred to devises for charitable uses to corporations would be void even in equity. That is not the case. While in such States a direct devise to a corporation would be void, a devise in trust for the use of a charitable corporation would be good,² unless statute has plainly said the contrary, or has set limitations to the doctrine.

In many of the States there is no such disability in corporations to take by will;³ and even in the States

¹ Attorney-Gen. *v.* Tancred, 1 Eden, 10; s. c. 1 W. Black. 91. There was formerly much doubt concerning the meaning of 43 Eliz. c. 4. But the view stated supra has been shown as a matter of history to be the true one. See *Jackson v. Phillips*, 14 Allen, 539, 577; Kent, ii. 286-288. Many cases of the kind, long before the statute of Elizabeth, have been brought to light. That statute, beyond pointing out the general features of a charity, only provided another mode of dealing with the subject; and that mode proved a failure. The old mode in equity remained and remains effective.

² *Orphan Asylum v. McCartee*, 9 Cowen, 437; *Potter v. Chapin*, 6 Paige, 639; *Street v. Mott*, 7 Paige, 77; *Moore v. Moore*, 4 Dana, 357; *Jackson v. Phillips*, 14 Allen, 539, 577; *Ould v. Washington Hospital*, 95 U. S. 303; *Howard v. American Peace Soc.*, 49 Maine, 288; *Clement v. Hyde*, 50 Vt. 716; *Norris v. Thompson*, 19 N. J. Eq. 307; *Dickson v. Montgomery*, 1 Swan, 348; *Lagrange Co. v. Rogers*, 55 Ind. 297; Kent, ii. 288. See *Pomeroy, Equity*, ii. § 1029, and notes.

³ See, e. g., *Phillips Academy v. King*, 12 Mass. 546; *Burbank v. Whitney*, 24 Pick. 151; *Gibson v. McCall*, 1 Richardson, 174; *Burr v. Smith*, 7 Vt. 241; *McCartee v. Orphans' Asylum*, 9 Cowen, 437.

which prohibit devises to corporations, the prohibition may be, and constantly is, done away by the charter of a particular corporation or by other legislation. In the absence of restraining legislation a corporation is as competent to receive a devise or a legacy as is a natural person.

Statutes and charters of incorporation generally limit the amount of property which can be held by a corporation. In such a case it is a question what will be the effect if by a particular gift the corporation receive more than the amount allowed. Some of the courts hold that the gift will be invalid to the extent of the excess.¹ Others hold that the provision operates only in favor of the State, while the whole gift remains good to the charity.²

Statutes in some of the States also provide that unless a certain stated length of time shall elapse between the execution of the will and the death of the testator, gifts by him to charitable corporations shall be void. Such legislation is of course aimed at death-bed gifts of the kind, and is based upon the theory that the testator ought to have time to think over the matter after making his will, and so be able to revoke a perhaps hasty and ill-advised bequest.³

Aliens have no heritable blood, by common law doctrine, and hence cannot take lands by descent except as

¹ *Gromie v. Louisville Orphans' Soc.* 3 Bush, 865; *McGraw v. Cornell Univ.* 111 N. Y. 66; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Davidson College v. Chambers*, 3 Jones, Eq. 253.

² See *Jones v. Habersham*, 107 U. S. 174, 183; *De Camp v. Dobbins*, 29 N. J. Eq. 35; s. c. 31 N. J. Eq. 671, 690; *Wood v. Hammond*, 16 R. I. 98.

³ For limitations of capacity in corporations based on residence of the testator, see *Thompson v. Swoope*, 24 Penn. St. 474; *White v. Howard*, 38 Conn. 342; *American Bible Soc. v. Marshall*, 15 Ohio St. 537; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Kerr v. Dougherty*, 79 N. Y. 327; *Healey v. Reed*, 153 Mass. 197.

statute permits; they are not disqualified from taking lands,¹ and of course they are not disqualified from taking chattels,² by *will* (or otherwise), unless statute disqualify them.³ But at common law an alien cannot hold land against the State. The consequence is that a devise to an alien would be good until the State took action in the matter; and until the State seizes the property the alien has complete authority over it and may convey it to another or maintain suit to recover it.⁴ Naturalization will, it seems, confirm a title to lands even against the State, where the lands were derived by will (or other purchase).⁵

Another disqualification to receive a legacy or a devise arises where the legatee or devisee becomes an attesting witness to the will. He may be competent by statute to attest the will, but if so made competent he is, on the other hand, made incapable of taking the bounty. In some States he is practically given his choice of remaining a good witness to the will by releasing the gift, or of retaining the gift and losing the position of witness; but (except in only one or two States) he cannot take the gift and still be a witness to the will.⁶

¹ Kent, ii. 54; *Phillips v. Moore*, 100 U. S. 208; *Cross v. De Valle*, 1 Wall. 1, 13; *Hall v. Hall*, 81 N. Y. 130; *Munro v. Merchant*, 28 N. Y. 9; *Wadsworth v. Wadsworth*, 2 Kern. 376. See also *Hauenstein v. Lynham*, 100 U. S. 483.

² *Craig v. Leslie*, 3 Wheat. 563; *Polk v. Ralston*, 2 Humph. 537.

³ The statutes must always be consulted; legislation has taken place upon the subject and is likely to continue.

⁴ *People v. Conklin*, 2 Hill, 67; *Bradstreet v. Supervisors*, 13 Wend. 546; *McCreery v. Allender*, 4 Har. & M. 409; *Foss v. Crisp*, 20 Pick. 121.

⁵ *People v. Conklin*, *supra*; *Osterman v. Baldwin*, 6 Wall. 116; *Harley v. State*, 40 Ala. 689.

⁶ See *ante*, pp. 50, 51.

CHAPTER XI.

'TO TAKE EFFECT AFTER DEATH.'

A CONTRACT, grant, or other instrument creating, enlarging, limiting, or defining rights may postpone the operation of the right until after one's death, but such instruments differ still from wills in the matter of post-mortem operation in that they take effect as valid and binding instruments at present or in the lifetime of the maker, or may so take effect. A will has no such effect; it creates no rights in the testator's lifetime, though laws may treat the instrument itself, before the testator's death, as one of a solemn and important character, no more to be disturbed by strangers than instruments conferring present rights.

Distinction between wills and contracts, grants, and the like.

That a will has no force as a disposition of property in the lifetime of the testator may be seen by a simple illustration. A father having three sons executes his will, by which he devises all his lands to one of them. The others becoming informed of the fact induce their father, by false and fraudulent representations in regard to their brother, to revoke the devise, and the devise remains revoked at the time of the father's death. This is no wrong in law to the devisee, inasmuch as he could have no right under the will until after the testator's death, and none, of course, then, unless the will remained unrevoked.¹

¹ *Hutchins v. Hutchins*, 7 Hill, 104; *Cases on Torts*, 76.

The essential feature of a will, in this particular, is that of its own nature it does not take effect until after the death of the testator. An instrument of that kind is so far a will, however inartificial, and whatever it may be called by the document itself. Accordingly an instrument described on its face as a deed may be admitted to probate as a will.¹ And the same may be true of an instrument which, in fact, is in part a deed, the rest being a will. Thus an indenture was made between two persons, whereby one bargained and sold, for a price to the other, a piece of land, in trust to sell it after the seller's death, and provided that part of the money to be received on the sale should be used in a certain way, the seller bequeathing the rest, together with all of the seller's personal estate, to certain persons; and appointing executors of his 'will.' This, which was all in one instrument, was held to be a will.²

More than that, two separate instruments, one taken alone being a deed and the other a will, may, according to doctrine elsewhere considered,³ be treated as one testamentary instrument. Thus by will duly executed and attested, a testator devised freehold lands to certain uses, with remainder to such persons and for such estates as he by any deed or instrument in writing, to be executed by him and attested by two witnesses, might appoint, thus reserving a power to dispose of such remainder thereafter. On the next day the same person executed an instrument as a deed, reciting the power in

¹ *Symmes v. Arnold*, 10 Ga. 506; *Gage v. Gage*, 12 N. H. 371; *Wheeler v. Durant*, 3 Rich. Eq. 452.

² *Hixon v. Wytham*, 1 Ch. Cas. 248; *Jarman*, 19.

³ *Ante*, pp. 59-62.

the will and concluding: 'Now know ye that by this my deed-poll I do direct and appoint' accordingly. This second instrument was executed as a deed and yet was held testamentary; and not having been executed as required by the Statute of Wills was invalid.¹ It was not good as a deed because in its real nature, as connected with the power, it was testamentary; it was not good as a will for want of due attestation as such.

On the other hand, an instrument standing by itself and wholly in the form of a present or past gift may, after all, be intended to take effect as a will. Writings such as the following have been held testamentary, in connection with admissible extrinsic evidence that they were executed with such intention: 'I wish A to have my bank-book for her own use;' ² 'I hereby make a free gift to A, of the sum deposited' in a certain bank;³ 'Know ye that . . . I have given and granted, and by these presents do freely give and grant, unto the said A . . . the moneys invested in my name in the Sheffield Savings Bank;' ⁴ 'I have given all to A and her sons; they are to pay [certain sums] to B and C and to divide the residue among themselves.'⁵ The external evidence received in these cases showed that it was not the intention of the maker of the instrument to cut himself off

¹ *Habergham v. Vincent*, 2 Ves. Jr. 204; s. c. 4 Bro. C. C. 355 (omitting the matter of the copyhold estates). A testator cannot reserve power to dispose of his estate thereafter by will. If the deed had been an *existing* instrument, it might have been incorporated into the will regardless of attestation. Ante, pp. 59-62.

² *Cock v. Cooke*, L. R. 1 P. & D. 241.

³ *Robertson v. Smith*, L. R. 2 P. & D. 43.

⁴ *In re Slinn*, 15 P. D. 156. 'It is clear,' said the court, 'that extrinsic evidence is admissible for the purpose of showing with what intention an ambiguous paper has been executed.' There was 'evidence of expressions wholly inconsistent with the idea that it was a gift out and out.'

⁵ *In re Coles*, L. R. 2 P. & D. 362; *Jarmaí*, 23.

from the use of the property; the property was to go to the person designated only after the owner could no longer have it — only after his death.

It is fair and it is correct to infer that if the instrument itself, or admissible evidence brought forward, shows that the real intention of the maker was to make a post-mortem disposition of his property, that intention will be allowed to take effect, however ignorantly or inartificially expressed.¹

¹ The following cases, in which the writing (duly executed and attested) was held testamentary, show how inartificial a disposition may be and yet be upheld: 'March th 4 Will my Properti to my wief my death John Sullivan.' *Sullivan's Estate*, 130 Penn. St. 342. 'Ann after my death you are to have forty thousand dollars; this you are to have will or no will.' *Byers v. Hoppe*, 61 Md. 206. 'At my death my estate or my executor pay to A three thousand dollars.' *Cover v. Stem*, 67 Md. 449.

Further, what constitutes a will, see *Gillham v. Mustin*, 42 Ala. 365; *In re Skerrett*, 67 Cal. 585; *Bristol v. Bristol*, 53 Conn. 242; *Seals v. Pierce*, 83 Ga. 787; *Massey v. Huntington*, 118 Ill. 80; *Castor v. Jones*, 86 Ind. 289; *Lautenshlager v. Lautenshlager*, 80 Mich. 285; *Cunningham v. Davis*, 62 Miss. 366; *Towle v. Wood*, 60 N. H. 434; *Reagan v. Stanley*, 11 Lea, 316; *Carlton v. Cameron*, 54 Texas, 72; *Coffman v. Coffman*, 85 Va. 459.

CHAPTER XII.

'MEANTIME BEING REVOCABLE.'

It is one of the tests of a will that it is revocable during the lifetime of the testator; that is, the instrument is not a will if the maker cannot revoke it.

The test does not work the other way; it is ^{Test of a will.} not true that an instrument which the maker may revoke is a will, even though it makes a disposition of property to be received after his death. A man may convey property subject to a life interest in himself, reserving in the instrument a power of revocation, without thereby converting a conveyance inter vivos into a will within the law relating to wills. A present right having been created in another by the transaction, the instrument cannot of itself be a will.¹

A will as a will cannot create rights in the lifetime of the testator, though, as we have seen, a will may carry with it external interests which the testator cannot annul. If a right is created against the maker of an instrument, it is only a truism to say that the maker cannot revoke the right; but as revocability is necessary to a will, the truism shows that the instrument cannot be a will.

It is consistent with this that one may bind oneself to make a will, or rather to make a devise or legacy to

¹ *Thompson v. Brown*, 3 Mylne & K. 32, virtually overruling *Attorney-Gen. v. Jones*, 3 Price, 363.

another, so that a failure to do so will be a breach of contract.¹ Nor would it be inconsistent with what has been said to say that one may bind oneself by contract not to revoke one's will. There is no way of preventing a person from breaking such agreement. The instrument, being a will and not itself creating rights while the testator is alive, may be revoked by him. It matters not as regards that power of revocation that by some other transaction the testator has bound himself not to revoke the will; such fact would avail nothing in a court of probate upon an attempt to set up a will which the testator had revoked according to law.²

All that the external agreement amounts to is that if it is broken the courts will enforce performance of the thing promised, out of the estate of the party bound, after his death. Thus, suppose that A and B agree, each in consideration of the other's undertaking, that each shall devise to the other all the land each owns; that separate wills are executed by each accordingly; that one of them dies, and the other then discovers that the decedent had revoked his will. That will could in no way be set on foot. The contract to devise might be binding, and the court might decree to the living the land left by the dead; but if so it would be the ordinary case of a decree specifically enforcing a contract for the purchase of land.³ And, on the other hand, if the will

¹ *Hale v. Hale*, 90 Va. 728, 730; *Swann v. Housman*, id. 816; *Manning v. Pippen*, 86 Ala. 357; *Russell v. Switzer*, 63 Ga. 711; *Gould v. Mansfield*, 103 Mass. 408; *Bird v. Pope*, 73 Mich. 89; *Anding v. Davis*, 38 Miss. 574. The evidence of such contract should be clear and convincing. *Swann v. Housman*, *supra*; *Rice v. Hartman*, 84 Va. 251.

² See *Gould v. Mansfield*, 103 Mass. 408; *Caton v. Caton*, L. R. 1 Ch. 137; s. c. L. R. 2 H. L. 127. See *Ex parte Day*, 1 Bradf. 476, *infra*.

³ See *Gould v. Mansfield*, *supra*, where the contract was not bind-

in question had not been revoked, the court would probably admit it to probate as a will; the fact that there existed a binding agreement to make it would not, it seems, take away its testamentary character, for it would still be revocable as a will.¹

If this be true, it results that an instrument may be a will, though to revoke it would be to violate a right, — a right created independently of the will. Consequences: Therein lies a cardinal difference between joint wills. wills and instruments creating rights; these latter cannot be revoked without the consent of the person in whose favor the right is created. But a difficulty arises at this point. Suppose that, instead of separate wills in favor of each of the testators, two or more should join in making a single 'will,' declaring in technical and deliberate language, 'We jointly give and devise' the property named; what would be the effect? By analogy to contract, and that analogy appears to have been applied, it would require the joint act of all the 'testators' to revoke the instrument, so long as they lived; towards each alone it would be irrevocable.² After the death of one the joint nature of the instrument would be destroyed; but, as before that event, none of the 'testators' could

ing. Where the contract is valid, the heirs or the devisees (as the case may be) of the decedent will be trustees in equity for performing the contract. *Hobson v. Blackburn*, 1 Addams, 274.

¹ In *Gould v. Mansfield* the plaintiff had made her will in accordance with the agreement. But the court said that that 'instrument was ambulatory and might have been revoked by various acts, or by implication of law from subsequent changes in the condition or circumstances of the testator. Gen. Sts. c. 92, § 11. The plaintiff's property is still, as it always has been, in her own hands and subject to her own control.' That is, she could still revoke her will.

² Not of course because it created rights, but because of the technical rule concerning joint instruments *inter partes*.

revoke the instrument without consent of all, it is extremely doubtful if the instrument could be regarded as a true will.¹ It must be a will when executed, to be a will at all.

It may, however, be the case that the parties are dealing, not with joint interests, but with property owned severally by each of them, only the instrument being joint; in which case the language of the instrument might justify the construction that it was intended for a separate disposition by each, as if by separate wills. Then the case would be the same in effect as the one first stated, and the instrument would be testamentary. It has, indeed, been laid down that though the instrument in point of form be joint, yet if it only dispose of the estate of the one who may die first, its legal effect is the same as if each had made a separate will disposing of the estate of each to the other in case of that other surviving.²

It would not affect the case that the two (or more) should severally dispose of their separate interests to a *third* person; difficulty arises only when they attempt in this way to dispose of a *joint* interest, or, what seems to be the same thing, to treat their separate interests as joint, and so to dispose of them to another. In such a case there is a joint instrument, in the technical sense, and hence an instrument that neither can revoke without the other's consent.

There is, however, one serious objection to treating instruments executed by more than one person as wills, whether the makers deal jointly or severally with the interests disposed of, and that is that the statutes plainly

¹ See *State Bank v. Bliss*, 67 Conn. 317; *Walker v. Walker*, 14 Ohio St. 157.

² *Lewis v. Schofield*, 26 Conn. 452.

contemplate only instruments executed by one person, and there is no other law of wills except that of the statutes. The statute must be complied with, and if there are two signatures to the instrument, the instrument, to be a will, must plainly be the several will of each and revocable by each, as if separately drawn out.¹

MARRIAGE.

By the common law of this country, as by the common law of England, marriage of a woman revokes a will made by her before the marriage.² In some States this is statutory law.³ The revoca- Woman's will at common law. tion is complete; the instrument is no longer a will for any purpose.⁴ This result, according to the current of

¹ There is some confusion upon this subject, but the text expresses the practical result of the general current of authority. See *Lewis v. Schofield*, 26 Conn. 452; *State Bank v. Bliss*, 67 Conn. 317; *Evans v. Smith*, 28 Ga. 98; *Walker v. Walker*, 14 Ohio St. 157; *Betts v. Harper*, 39 Ohio St. 639; *Schumacker v. Schmidt*, 44 Ala. 454. These cases support *Lewis v. Schofield*. In *Ex parte Day*, 1 Bradf. 476, it is held that mutual or conjoint wills may be admitted to probate though executed by binding agreement, for though irrevocable as contracts, they are still revocable as wills by either of the testators on notice in the lifetime of both. After the death of either the will would perhaps be binding upon the other. *Dufour v. Pereira*, 1 Dick. 419. But see *State Bank v. Bliss*, 67 Conn. 317. Further see *Black v. Richards*, 95 Ind. 184; *In re Diez*, 50 N. Y. 180; *Mosser v. Mosser*, 32 Ala. 551; *March v. Huyter*, 50 Texas, 243; *Wyche v. Clapp*, 43 Texas, 544; *Breathitt v. Whittaker*, 8 B. Mon. 530.

² *Nutt v. Norton*, 142 Mass. 242, 245; *Crum v. Sawyer*, 132 Ill. 443; *Craft's Estate*, 164 Penn. St. 520 (statute); *Fidelity Trust Co.'s Appeal*, 121 Penn. St. 1; *Morton v. Orion*, 45 Vt. 145; *Lansing v. Haynes*, 95 Mich. 16, 19; *In re Ward*, 70 Wis. 251. The substance of what here appears is from a note by the present writer to *Jarman on Wills*, 110.

³ *In re Comassi*, 107 Cal. 1 (this statute not applicable to a second marriage after the will).

⁴ *Fidelity Trust Co.'s Appeal*, *supra*.

authority, is not due to any presumptive intention; hence it is immaterial that the testatrix did not know that marriage would revoke her will.¹ The rule is a necessary consequence of the husband's common-law marital rights. The existence of those rights had the effect to prevent a married woman from having capacity to make a will; and, as a married woman could not make a will, she could not revoke one, revocation itself being of a testamentary nature. Hence, but for the rule that marriage worked a revocation of a woman's will, her will made before marriage would by the marriage lose its most characteristic feature; it would become irrevocable.

It has, however, always been possible to prevent this result by antenuptial treaty, whereby the intended husband put aside all claims in or to his wife's property aceruing by virtue of his marital rights.² But even in such a case the birth of a child not provided for by the will would revoke the instrument. The fact that the woman who when unmarried made the will survived her husband would not revive her will.³

A man's will, however, is not at common law revoked by his subsequent marriage; but if the birth of a child, even posthumously,⁴ follow, revocation takes place.⁵ But just as the revocation by marriage of a woman's antenuptial will could be prevented by treaty before the marriage, so the revo-

¹ *Brown v. Clark*, 77 N. Y. 369. But see *Miller v. Phillips*, 9 R. I. 141.

² *Havens v. Van Den Burgh*, 1 Denio, 27; *Osgood v. Bliss*, 141 Mass. 476; *Stewart v. Mulholland*, 88 Ky. 38.

³ *Brown v. Clark*, 77 N. Y. 369.

⁴ *Hart v. Hart*, 70 Ga. 764.

⁵ *Gay v. Gay*, 84 Ala. 38; *Lansing v. Haynes*, 95 Mich. 16, 19; *Milburn v. Milburn*, 60 Iowa, 411 (illegitimate child recognized by father

cation of a man's will by marriage and the birth of a child could be prevented by providing for the children to be born of the marriage.¹ Such provision need not be made in the will.² Property acquired after making the will, and not passing by it, cannot be treated as a provision for such children.³

Unlike the rule in regard to the revocation by marriage of a woman's will, this rule of the revocation of a man's will has sometimes been said to rest upon the ground of presumed intention because of the change of circumstances. That Ground of revocation; tacit condition. is, it is considered that on the birth of a child of the marriage the situation is so changed that the husband would have revoked his will by express act had his attention been called to the case.⁴ It follows that the will is not revoked by marriage and birth, if it appears that the testator intended still that it should stand. This was the view which our courts adopted from England; but later authority in that country puts the subject in a different light. The later, and, it seems, the more correct view, is that a tacit condition is annexed to the will, to wit, that the will shall not take effect in the event of the testator's marriage and the birth of a child thereof.⁵

with same effect); *Goodsell's Appeal*, 55 Conn. 171; *Hart v. Hart*, 70 Ga. 764; *Davis v. Fogle*, 124 Ind. 41; *Alden v. Johnson*, 63 Iowa, 124; *Baldwin v. Spriggs*, 65 Md. 373; *Morgan v. Davenport*, 60 Texas, 230.

¹ *Gay v. Gay*, 84 Ala. 38; *Warner v. Beach*, 4 Gray, 162.

² *Havens v. Van Den Burgh*, 1 Denio, 27.

³ *Baldwin v. Spriggs*, 65 Md. 373. As to the effect of a divorce obtained by the testator, see *Charlton v. Miller*, 27 Ohio St. 298; *Lansing v. Haynes*, 95 Mich. 16; *Baacke v. Baacke*, 50 Neb. 18.

⁴ *Gay v. Gay*, *supra*; *Havens v. Van Den Burgh*, *supra*; *Warner v. Beach*, 4 Gray, 162, 163; *Miller v. Phillips*, 9 R. I. 141.

⁵ *Marston v. Roe*, 8 Ad. & E. 14 Ex. Ch.; *Israell v. Rodon*, 2 Moore, P. C. 51.

It matters not whether the will relates to realty or to personalty, or to both.¹ Nor should it make any difference, perhaps, that the testator had children by a former marriage, and that by the will he gave his property to them.² Death in the testator's lifetime of the child in question will not revive the will.³

The foregoing is common-law doctrine. The subject is more or less, and differently, affected by statute in the different States, in regard to marriage Statute. as a revocation of a woman's will. Many of the courts look upon the recent legislation in regard to married women, by which the marital rights of the husband have been so much changed, as having the effect to overturn the common-law rule of revocation by marriage in the case of a woman's will; the argument being that as the ground of the rule has been cut away, and married women may now make wills, the rule of revocation is itself at an end.⁴ Some of our courts, however, continue to hold that marriage alone, in the case of a woman, has the effect to revoke her antenuptial will. The legislation enlarging the powers of married women is considered not specific enough to justify the courts in treating it as abrogating the common-law rule of revocation.⁵

¹ Same cases; *Jacks v. Henderson*, 1 Desaus. 543, 557. In *Marston v. Roe* the will disposed of realty; in *Israell v. Roden*, of personalty.

² *Havens v. Van Den Burgh*, supra. But see *Marston v. Roe*, supra.

³ *Ash v. Ash*, 9 Ohio St. 383.

⁴ *Emery*, Appellant, 81 Maine, 275; *Webb v. Jones*, 36 N. J. Eq. 163; *In re Ward*, 70 Wis. 251. Statute in some States puts the will of a woman on the footing of the common law as to wills of men. *Noyes v. Southworth*, 55 Mich. 173.

⁵ *Nutt v. Norton*, 142 Mass. 242, 245; *Brown v. Clark*, 77 N. Y. 369.

What is said in the foregoing paragraphs relates to wills by which the testator or testatrix disposes of his or her own property; marriage, or marriage Wills under and the birth of a child, will not revoke a powers. will by which the property of another, under a power of appointment, is disposed of.¹ Nor should the foregoing be confused with the rights of children not provided for by the parent's will, under legislation touching that subject; such legislation not relating to future marriages.

DESTRUCTION OF WILL: BURNING, TEARING, &C.

The English Statute of Frauds enacted that 'no devise in writing of any lands, tenements, or hereditaments, nor any clause thereof, shall be revocable other- Statute of wise than by some other will or codicil in Frauds. writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence and by his direction and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated by the testator or his direction in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing declaring the same.'

This with some modifications in various States represents the law of revocation (other than that before considered) in this country. Burning, tearing, and obliterating, *animo revocandi*, is doubtless an effective mode of revocation everywhere. And it matters not whether the will disposes of realty or personalty, or both; it was not necessary in the English Statute of Frauds to specify wills of personalty, for they always could be revoked in the modes mentioned by the statute.

¹ See *Osgood v. Bliss*, 141 Mass. 476.

In some of our States other statutory words are used or suggested, such as 'defacing' and 'mutilation.'¹

The word 'destruction,' too, is often used, 'Defacing,'
'mutilating,' but that is probably only a general designa-
'destroying,' tion, used for convenience to cover, without enlarging, the words of the statute.² On the other hand, because of other provisions of statute, cancellation, if not prior to execution, may not be sufficient to amount to revocation, where it consists merely in drawing the pen through some term or provision, unless the act is signed and witnessed according to the manner of a written revocation.³ Under such legislation only burning, tearing, or otherwise destroying a will would work a revocation of it by act done to or upon the will. The word 'tearing' is held to include cutting;⁴ 'for it would be absurd to say that a will torn into two pieces was revoked, but that if cut into twenty pieces it was not revoked.'⁵

These modes of revocation are exclusive of all other modes by act done upon or to the will. That is, no act done upon or to the will falling short of the meaning in law of the words of the statute can amount to revocation.⁶ Hence it would be of no use for the testator to write upon his will, 'I revoke this will,' though adding his signature and a date; he should have the declaration attested, written

These modes
exclusive of
others.

¹ Succession of Müh, 35 La. An. 394; *Tucker v. Whitehead*, 59 Miss. 594.

² See *Wilborn v. Shell*, 59 Miss. 205; *McClure v. McClure*, 86 Tenn. 173.

³ Comp. 1 Vict. c. 26, §§ 20, 21, to that effect.

⁴ *Hobbs v. Knight*, 1 Curteis, 768.

⁵ *Jarman*, 115.

⁶ See *Gay v. Gay*, 60 Iowa, 415; *Stickney v. Hammond*, 138 Mass. 120; *Kennedy v. Upshaw*, 64 Texas, 411.

revocation being treated, so far, as a testamentary act.¹ Much less would a written declaration, unattested, of intent to revoke work a revocation.² Indeed it is held that the cancellation of the testator's signature by his drawing his pen through it, *animo revocandi*, has no effect.³ Nor is it a revocation, or, if no later inconsistent will is found, any evidence of revocation, that the testator has left a duly executed will among worthless papers.⁴ And this though such papers are memoranda drafts of incomplete wills later than the one in question.⁵

The statutes accordingly declare in effect that a written will cannot be revoked orally.⁶ Hence a direction by the testator to destroy his will has no effect, No oral revocation. and that, too, though he afterwards believes, tion. contrary to the fact, that his direction was carried out.⁷

To destroy a will completely it is not necessary, in a tearing or cutting, or act of like nature, to tear or sever the instrument into two or more parts. The instrument after tearing may still hang together and yet be destroyed as a will. Destroying: what amounts to. More than that, the tearing out, or the like, of that which,

¹ *In re Ladd*, 60 Wis. 187, and cases cited. *Contra*, *Witter v. Mott*, 2 Conn. 67; *Warner v. Warner*, 37 Vt. 356.

² *Rife's Appeal*, 110 Penn. St. 232.

³ *Gay v. Gay*, 60 Iowa, 415. But see *Succession of Müh*, 35 La. An. 394. Tearing off a seal with intent to revoke is, however, a revocation, though a seal is not necessary to a will. But that is because the act is a *tearing*. See *infra*.

⁴ *Hoitt v. Hoitt*, 63 N. H. 475.

⁵ *Id.*

⁶ *Kirkpatrick v. Jenkins*, 96 Tenn. 85; *Lansing v. Haynes*, 95 Mich. 16, 19; *Hoitt v. Hoitt*, 63 N. H. 475; *Hargroves v. Redd*, 43 Ga. 142; *Wittman v. Goodhand*, 26 Md. 95; *Jones v. Moseley*, 40 Miss. 261; *Belshaw v. Chitwood*, 141 Ind. 377.

⁷ *McBride v. McBride*, 26 Gratt. 476; *Mundy v. Mundy*, 15 N. J. Eq. 290.

though but part of the physical instrument, is to be considered as the principal part, or that which, like the signature, gives effect to the whole, will revoke the will as completely as if it had been burnt up.¹ Probably the same result would be effected by tearing off the signatures of the witnesses. Indeed it has been held that the scratching out, with a knife, of the signatures of the testator and of the witnesses has the same effect.² So, too, to tear off the last signature to a will in several sheets, each of which is signed and witnessed, revokes the will completely, though the other signatures are untouched.³ Even tearing off a seal, with intent to revoke a will purporting to be executed under seal, has been held to have the same effect, though a seal is not necessary to a will,⁴ for without the seal the instrument is not the one which the testator intended when he executed it.

A more difficult case to deal with is presented where it appears that an intent to destroy the will was followed up by attempted execution of the purpose, but the attempt was frustrated by another when but partly carried out. The intent to destroy amounts to nothing, as we have seen, unless it is put into execution, and that, too, by execution, according to the statute; but what of intention to destroy partly executed and frustrated, and yet not stayed by any change of mind in the testator? The following is a statement of a familiar English case upon the point:

¹ *Hobbs v. Knight*, 1 Curteis, 768; *Bell v. Fothergill*, L. R. 2 P. & D. 148; *In re Simpson*, 5 Jur. n. s. 1366. See *Succession of Müh*, 35 La. An. 394; *Jarman*, 115.

² *In re Morton*, 12 P. D. 141.

³ *In re Gullan*, 1 Swab. & T. 29; *Gullan v. Grove*, 26 Beav. 64.

⁴ *Avery v. Pixley*, 4 Mass. 450; *In re White*, 25 N. J. Eq. 501; *Price v. Powell*, 3 Hurl. & N. 341. See *Williams v. Tyley*, Johns. 530.

A testator dissatisfied with his will, as he had often declared, being in bed near the fire, ordered his servant to fetch his will, which she did. The will was then whole, but somewhat creased. The testator opened and looked at it, then ript it so as nearly to tear off a piece, and, now rumpling it up, threw it upon the fire. It fell off, but still would soon have been burnt up had not the servant picked it up and put it away. This the testator did not see her do, and the servant afterwards told him, upon repeated inquiries, that she had destroyed the paper, which was false. The testator afterwards told a friend that he had destroyed his will, and should make no other until he had seen his brother. He wrote to his brother to the same effect, desiring him to come to him, and saying, 'If I die intestate, it will cause uneasiness.' But the testator died without making another will. It was found by the jury, and the verdict was on a motion for a new trial supported by the opinion of the court, that the will had been revoked. The court said that there had been both a burning and a tearing, and that throwing the will on the fire with intent to burn it up was enough under the statute, notwithstanding the fact that it fell off only slightly singed.¹

The meaning of this case must not be mistaken. It does not teach that an *attempt* to destroy a will by tearing and burning, or in any other way, amounts to a revocation within the meaning of such a statute as the one under consideration; nor does it teach that a jury may find that an attempt of the kind satisfies the law. The case must be taken upon its special facts, beyond which it is not authority. The deception practised upon the testator, together with the singeing, is to be taken as a

¹ *Bibb v. Thomas*, 2 W. Black. 1043, as stated in *Jarman*, 120. See also *White v. Casten*, 1 Jones, 197; *Johnson v. Brailsford*, 2 Nott & McC. 272.

chief factor in the decision reached.¹ There is, indeed, even ground for doubt whether the statute is satisfied where the testator's purpose was frustrated (as here) by the misconduct of another. Later English authority strengthens the doubt. A testator, according to the testimony of his servant, threw his will, as in the case just stated, on the fire; a relative of the testator who lived with him at once snatched it away, so that the fire merely singed a covering of the will. The testator afterwards insisted that the relative give up the will to be burnt, which she promised to do. To satisfy the testator she threw something into the fire, which she falsely said was the will. The testator appears to have doubted her, for he said, in reply to a doubt about it, expressed by his servant, 'I do not care; I will go to L. if I am alive and well, and make another will.' It was held that there had been no revocation of the will.²

Our American courts, or some of them, however, appear to hold that deception practised upon the testator, in an attempt made by him according to the mode of the statute to revoke his will, should not be allowed to prevail over the testator's purpose; the will is to be treated as revoked.³ Indeed it is

American doctrine on the subject.

¹ See *Mundy v. Mundy*, 15 N. J. Eq. 290; *Gains v. Gains*, 2 A. K. Marsh. 190; *Jackson v. Betts*, 9 Cowen, 208; *Hise v. Fincher*, 10 Ired. 139.

² *Doe v. Harris*, 6 Ad. & E. 209. See *Cheese v. Lovejoy*, 2 P. D. 251. 'It is impossible,' said Lord Denman in *Doe v. Harris*, 'to say that singeing a cover is burning a will within the meaning of the statute.' Patterson, J.: 'To hold that it was so would be saying that a strong intention to burn was a burning. There must be, at all events, a partial burning of the instrument itself.'

³ *Pryor v. Coggin*, 17 Ga. 444; *Smiley v. Gambill*, 2 Head, 164; *Blanchard v. Blanchard*, 32 Vt. 62. See *Melanefy v. Morrison*, 152 Mass. 473, 476, where the effect of force or fraud is left an open question.

broadly laid down in this country that if a revocation, as by burning, was interfered with by fraud, without the testator's knowledge, the will is void not merely at this stage, but does not become valid afterwards on discovery of the fraud without some act amounting to a new publication of it.¹ But the mere fact that a testator supposes that a direction by him to destroy his will has been complied with would nowhere be considered a compliance with the statute.²

Whatever is to be thought of the effect of deception practised upon a testator, who has in this way partly carried out his purpose to destroy his will, it is clear that he himself may change his mind before his act of destruction has become final. And if he should do so, and restore the will if, and as far as, possible, as by putting it together again entire after tearing it asunder, the will remains good.³ But if restoration is impossible, the testator's change of mind afterwards will be only repentance of an act which cannot now be helped.

It sometimes happens that a testator, intending to destroy his will, destroys as a matter of fact another instrument by mistake, supposing it to be his will. It is held in this country that, in such a case, if the testator, after thus destroying the wrong instrument, continues in the belief that he has destroyed his will, without any subsequent

Destroying the wrong instrument.

¹ *Kent v. Mahaffy*, 10 Ohio St. 204; *Bohanan v. Walcot*, 1 How. (Miss.) 336; *Burns v. Burns*, 4 Serg. & R. 567.

² *Boyd v. Cook*, 3 Leigh, 32; *Malone v. Hobbs*, 1 Robinson, 346.

³ *Doe v. Perks*, 3 Barn. & Ald. 489; *Doe v. Harris*, supra; *Elms v. Elms*, 1 Swab. & T. 155. See *In re Cockayne*, 1 Deac. 177; s. c. 2 Jur. n. s. 454. It may not be necessary for the testator to repair a breach made in the will with intent to destroy it, where he changes his mind before the will is torn asunder.

recognition of it or knowledge of its existence, the will is to be considered as revoked.¹

The modes of revocation, specified by the later legislation, have reference, generally speaking, to revoking the whole will, not to revoking parts of it; so that ordinarily there can be no such thing as partial revocation by burning, tearing, or destroying. So, too, obliterating, erasing, or cancelling portions of a will in most States have no effect, as we have seen, unless signed and attested, if it is possible still to make out or prove the language affected.² In some States, however, the statute has been interpreted to refer to part, as well as to entire revocation;³ as in Massachusetts, by treating the statute as including early legislation which expressly permitted devises 'or any part thereof' to be revoked.⁴ And it would probably be held by most courts that cutting out or obliterating a clause the contents of which cannot now be made out or proved, would work a revocation pro tanto, but not entire except in cases in which that which is left depended upon the part destroyed so as not to be separable from it.

These statutory modes of revocation raise only a presumption of intent to revoke; which presumption may

¹ *Smiley v. Gambill*, 2 Head, 164; *Ford v. Ford*, 7 Humph. 104.

² *Simrell's Estate*, 154 Penn. St. 604; *Lovell v. Quitman*, 88 N. Y. 377, 381; *Law v. Law*, 83 Ala. 432; *Eschbach v. Collins*, 61 Md. 478; *Griffin v. Brooks*, 48 Ohio St. 211; *Hesterberg v. Clark*, 166 Ill. 241; *Lurie v. Radnitzer*, id. 609.

³ *Bigelow v. Gillott*, 123 Mass. 102; *Townshend v. Howard*, 86 Maine, 285; *Succession of Müh*, 35 La. An. 394; *In re Miles*, 68 Conn. 237.

⁴ *Bigelow v. Gillott*, 123 Mass. 102. But see *Law v. Law*, 83 Ala. 432.

be overturned (or fortified) by other evidence,¹ such as evidence of declarations of the testator ^{Presumptive} accompanying the act, or near the time ^{intent.} of it.² But it should be well observed that evidence of intention to revoke, or the contrary, is admissible only when an act appears upon the will which presumptively satisfies the meaning of the statute.³ It should also be noticed that acts done to or upon the will stand upon a different footing from language directly or indirectly revocatory. Such acts are explainable because they are equivocal, while language of revocation is, of course, decisive of intention.⁴

The physical destruction of a will may then be explained away by evidence that it was done without intent to revoke.⁵ Thus if a testator should ^{Intent to revoke} destroy his will through inadvertence,⁶ or ^{necessary.} where intending to cut out a particular provision, leaving the rest intact, he should by mistake cut out something else, such as part of the attestation,⁷ or where he should destroy his will upon the mistaken belief that it was invalid,⁸ or that it had already been revoked,⁹ or only with intent to make a fair copy of it,¹⁰ the will may

¹ *Law v. Law*, supra; *In re Kidder*, 66 Cal. 487; *Forbing v. Weber*, 99 Ind. 588; *Caeman v. Van Harke*, 33 Kans. 333.

² *Caeman v. Van Harke*, supra.

³ *Gay v. Gay*, 60 Iowa, 415; *Hoitt v. Hoitt*, 63 N. H. 475.

⁴ *Wurzell v. Bäckman*, 52 Mich. 478.

⁵ *Law v. Law*, 83 Ala. 432; *In re Kidder*, 66 Cal. 487; *Smock v. Smock*, 11 N. J. Eq. 156; *Smiley v. Gambill*, 2 Head, 164; *Marr v. Marr*, id. 303.

⁶ *Burtonshaw v. Gilbert*, Cowp. 52.

⁷ *In re Taylor*, 63 L. Times, 230.

⁸ *Giles v. Warren*, L. R. 2 P. & D. 401; *In re Thornton*, 14 P. D. 82.

⁹ *Scott v. Scott*, 1 Swab. & T. 258; *Clarkson v. Clarkson*, 2 Swab. & T. 497.

¹⁰ *Wilbourn v. Shell*, 59 Miss. 205.

still be established as if the act had not been done. The same would be true where the testator, when destroying his will, lacked the power of legal intention, as where he was insane at the time,¹ or where his own intention was subverted by the intention of another, as in a case of compulsion or undue influence.²

The effect of intention in revocation may be seen again in a case of dependent revocation. Thus where the act of destruction is connected with the making of another will, so as fairly to raise the implication or inference that the testator meant that the revocation of the first instrument, duly executed, should depend upon the second one's taking effect as a substitute, the legal result will correspond with the intention. Hence if the second instrument fail for any reason in taking effect, the first one will remain in force.³ A testator, having some time before executed a will, duly attested, to each sheet of which he had affixed a seal, instructed his solicitor to prepare another, and signed the draft prepared from the instructions, and then proceeded to tear off the seals from the old will. After all the seals but one had thus been torn off, he was informed that the new will, in its present condition, would not be operative upon his lands, which induced him to desist. Before the new will was completed, the testator died. It was held that the original will remained unrevoked.⁴

¹ *Rich v. Gilkey*, 72 Maine, 595; *McIntire v. Worthington*, 68 Md. 203.

² Same cases; *Laughton v. Atkins*, 1 Pick. 535, 547; *Balton v. Watson*, 13 Ga. 63.

³ See *Wilbourn v. Shell*, 59 Miss. 205; *Youse v. Forman*, 51 Bush, 337.

⁴ *Jarman*, 120, citing *Hyde v. Hyde*, 1 Eq. Cas. Abr. 409; s. c. 3 Ch. Rep. 155.

Far within the doctrine just set forth would be the case of a testator destroying his will for the *purpose* of substituting a new one in place of it, which ^{Substitution intended.} new one, in fact, is not made. The will, physically destroyed, could be established.¹ So where the later of two inconsistent wills is destroyed in the belief that the earlier is thereby revived; if this belief is erroneous (which will depend upon local statute), the later will remains in force. For the intention in such a case is not an intention to revoke but to validate another instrument; there is only a conditional intention to revoke, the condition fails, and the revocation fails with it.²

Obliterations, interlineations, and the like, on the face of a will, obviously stand upon a footing of their own, for they may have been made before the ^{Obliterations, interlineations, &c.: presumption as to time.} execution of the will;³ in which case they should be treated as valid, for they are then in no sense revocations. The statutes invalidating alterations of the will refer to alterations after attestation. When there is no evidence to show when the alterations were made, a presumption arises that they were made after the execution, according to the better authorities, and (if they are not duly attested) the result is, that they must be held invalid unless the presumption

¹ *Dancer v. Crabb*, L. R. 3 P. & D. 98, 104.

² *Powell v. Powell*, L. R. 1 P. & D. 98, 209, overruling *Dickinson v. Swatman*, 4 Swab. & T. 205. Compare revocation under mistake of fact as conditional revocation. But of course the mere fact that a testator destroys the later of two inconsistent wills, having the intention to make another, which he fails to make, will not revive the earlier, though that should be found among his papers. *McClure v. McClure*, 86 Tenn. 173.

³ The instrument upon which a will is executed might possibly have been somewhat mutilated before the will was executed, but that would be unusual; a contrary presumption would clearly arise. See *Christmas v. Whinyates*, 32 L. J. Prob. 73.

is overturned by competent evidence.¹ This rule rests upon either of two grounds, or upon both of them. The first is that a substantive burden, according to most authorities, rests upon the proponent of a will to prove it. If, then, there be any indication of change of purpose in the testator, as by unattested alterations, it is for the proponent to show that the will was changed before it was executed. The other ground arises from what is called the ambulatory nature of wills. Unlike a deed, a will remains in the control of the testator during his lifetime, and it is such a common thing for testators to change their wills, that a presumption is deemed to arise that unattested alterations were made after the execution of the will,²—a presumption, however, which assumes that the will has been in the possession of the testator since he executed it.

The same presumption of the time of alterations arises where to the will in question there is a codicil which takes no notice of the alterations.³ A different case would perhaps be presented where it appears that a will was drawn up with blanks left for names and amounts, and that these blanks were afterwards filled, no evidence of the time when being before the court. In such a case it would be natural to suppose, and such would be the presumption, that the blanks were filled before execution of the will.⁴ But slight circumstances might overturn the presumption.⁵

¹ The cases are numerous. The following may be mentioned: *Greville v. Tylee*, 7 Moore, P. C. 320; *Cooper v. Bockett*, 4 Moore, P. C. 419; *Simmonds v. Rudall*, 1 Sim. N. S. 115; *Doe v. Palmer*, 16 Q. B. 747. But see *Wikoff's Appeal*, 15 Penn. St. 281.

² *Greville v. Tylee*, 7 Moore, P. C. 320.

³ *Lushington v. Onslow*, 12 Jur. 465; *Rowley v. Merlin*, 6 Jur. N. S. 1165.

⁴ *In re Cadge*, L. R. 1 P. & D. 543.

⁵ See *Birch v. Birch*, 6 Notes of Cases, 581.

It may of course be shown that the alteration was made by a person not authorized to make it, in which case the will as it originally stood will be admitted to probate, if the original language can be made out or proved. But if the alteration was made by a person interested in the dispositions made, it is said that the original provision in his favor becomes void in consequence of his altering it.¹

Where a will is executed in duplicate, the destruction by the testator of but one of the two is somewhat ambiguous. But there appears to be a presumption that the destruction of the one part was intended as a revocation of the will,² especially where the one left is in the hands of another person (as for instance the executor) and is allowed to remain there. The same presumption arises, but in a weaker form, where the testator was in possession of both parts and destroyed one.³ In no case is the presumption conclusive.

Lost wills sometimes raise difficult questions of revocation. The general rule appears to be that if a will is traced into the testator's hands and it cannot be found at his death, a prima facie presumption arises that the testator destroyed it *animo revocandi*.⁴ But if the will is traced out of his hands,

¹ *Jackson v. Malin*, 15 Johns. 297, 298.

² *Crossman v. Crossman*, 95 N. Y. 145; *Hubbard v. Alexander*, 3 Ch. D. 738.

³ *Pemberton v. Pemberton*, 13 Ves. 310.

⁴ *Gardner v. Gardner*, 177 Penn. St. 218; *Boyle v. Boyle*, 158 Ill. 228; *Taylor v. Pegram*, 151 Ill. 106, 116; *In re Valentine*, 93 Wis. 45; *Cheever v. North*, 106 Mich. 390; *Behrens v. Behrens*, 47 Ohio St. 323; *McDonald v. McDonald*, 142 Ind. 55, 82; *Snider v. Burks*, 84 Ala. 53; *In re Johnson*, 40 Conn. 587; *Lively v. Harwell*, 29 Ga. 509; *Collagan*

he who asserts that it has been revoked must show that it came back into the testator's hands or was destroyed by his direction.¹ Accordingly the presumption of revocation does not arise when it appears that, upon the execution of the will, it was deposited by the testator with another, and that the testator did not afterwards have it in his possession or have access to it.² Much less will the presumption arise if the will is found in the possession of a person interested in its provisions.³

It is necessary, generally speaking, that a will revoking prior wills should be probated, to give it effect by way of revocation as well as in any other way. But if, by reason of the loss or destruction of a *valid* revoking will, nothing more than the revoking clause or the plain revoking effect of the instrument can be proved, it is proper still to give it effect as a revocation.⁴

The destruction of a will does not necessarily operate as a revocation of a codicil, unless the terms of the codicil are so dependent upon the will that it cannot take effect without the will. But in the absence of evidence there appears to be a presumption of some slight force that the testator intended that his act of revocation of the will should

Revocation of
both will and
codicil.

v. Burns, 57 Maine, 449; *Newell v. Homer*, 120 Mass. 277; *Collyer v. Collyer*, 110 N. Y. 481; *Scoggins v. Turner*, 98 N. C. 135; *Jones v. Murphy*, 8 Watts & S. 275; *Brown v. Brown*, 10 Yerg. 84; *Minkler v. Minkler*, 14 Vt. 125; *Appling v. Eades*, 1 Gratt. 286; *Tynan v. Paschal*, 27 Texas, 286.

¹ *Jarman*, 125.

² *Schultz v. Schultz*, 35 N. Y. 653.

³ *Bennett v. Sherrod*, 3 Ired. 306.

⁴ *Wallis v. Wallis*, 114 Mass. 510; *Stevens v. Hope*, 52 Mich. 65; *In re Cunningham*, 38 Minn. 169. The revoking part need not, it seems, be formally probated, though a will may be probated in part, and for the rest refused probate. *Laughton v. Atkins*, 1 Pick. 535, 548.

involve the codicil, though the codicil could stand without the will. Such at least was the doctrine in England before the Wills Act of the present reign.¹

SUCCESSIVE REVOKING WILLS.

A single case of the effect of revocation will conclude this part of our subject. A testator has executed, successively, three wills. The second revokes the first;² the third revokes the second; does the revocation of the middle will have the effect to revive the first one? The English courts, prior to the present Wills Act, answered this question affirmatively, as a *prima facie* presumption. The rule is now changed in England by the Act mentioned, which permits the revival of the first will only (1) where the testator re-executes it, or (2) where he executes a codicil which shows an intention to revive the will. Similar statutes prevail in this country.³

In this country, generally, in the absence of statute, there appears to be no presumption either way; the question whether the first will is revived by the revocation of the second being a simple question of intention.⁴ But

¹ See Jarman, 125.

² A second will which completely disposes of all the property of the testator impliedly revokes the first. *Teacle's Estate*, 153 Penn. St. 219, 223. That is because the two are inconsistent or incompatible. *Id.* If they are not, and there are no words of revocation, the second does not revoke the first. *Gordon v. Whitlock*, 92 Va. 723. See *infra* p. 136.

³ Rev. Stats. N. Y., ii. 66, § 53; Kent, iv. 532; *In re Lones*, 108 Cal. 688. The English statutes appear to have followed the alterations made by the Revised Statutes of New York, 'and they cut up a vast field of established judicial legislation.' Kent, iv. 533, note.

⁴ *Pickens v. Davis*, 134 Mass. 252; *Simmons v. Simmons*, 26 Barb. 68; *Colvin v. Warford*, 20 Md. 357; *Harwell v. Lively*, 30 Ga. 315; *Scott v. Fink*, 45 Mich. 241; *Flintham v. Bradford*, 10 Penn. St. 82, 85, 92; *Hawes v. Nichols*, 72 Texas, 481; *Peck's Appeal*, 50 Conn. 563.

there is authority to the contrary.¹ According to the more general rule, in the absence of affirmative evidence of intention to revive, the first will remains revoked.

ALIENATION.

At common law a will disposing of lands operated as a conveyance, and consequently passed only such devised lands as the testator was seised of at the time of making his will, for the will operated, for that particular purpose, from that time. The consequence of this was that subsequent alienation by the testator of such lands withdrew them from the operation of the will, virtually revoking it to that extent. It made no difference that the testator afterwards re-acquired the lands, or, indeed, took them back by the same instrument or by a declaration of uses. This did not give effect to a devise which had been made before the title was acquired;² it would not have given effect to the devise even if the testator had expressly declared his intention in the will to give such lands, in case of a sale and subsequent repurchase of them by him, to the devisee, for the common law rule was not based upon any supposed intention in the testator. But this rule has been changed by statute, and after-acquired lands may now be devised. Hence the alienation of devised realty does not now so effectually withdraw the estate from the operation of the will as to prevent a subsequent re-acquisition of it from passing under the devise. Nothing short of a revocation of the will, or of the particular gift, in some other legal way, will, under this

¹ *Taylor v. Taylor*, 2 Nott & McC. 482; *Randall v. Beatty*, 4 Stewt. (N. J.) 643.

² See *Kent*, iv. 529-531; *Brown v. Brown*, 16 Barb. 569; *Vaudemark v. Vaudemark*, 26 Barb. 416.

legislation, prevent the passing under the will of any estate, real or personal, which the testator has the power, at his death, to dispose of.

But of course property disposed of by the testator, after the making of his will, is withdrawn from the operation of the will and must remain so unless Contract to it is afterwards re-acquired by the testator.¹ sell.

It is only, however, to the extent which the subsequent disposition withdraws the property (real or personal) from the will that the will is revoked or fails to operate. Hence where a testator contracts to sell the estate given by his will, and dies without executing a conveyance, the will remains in force in respect of the legal interest in such estate, but no further; the legal estate is all that the testator has the power at his death to dispose of. The devisee, if it be a gift of land, takes only the legal estate therein, and the purchase-money becomes part of the testator's personal estate.² Accordingly the devisee is entitled to the rent of the lands until the sale is completed.³

Revocation, then, by alienation after the making of the will may be partial or total.⁴ A simple instance or two of partial revocation may be given. Thus a testator, having devised lands in fee, Partial revoca-
tion by aliena-
tion. afterwards demises the same lands for a term of years. The lease in such a case revokes the

¹ *Collup v. Smith*, 89 Va. 258.

² *Farrar v. Winterton*, 5 Beav. 1. See *Padfield v. Padfield*, 72 Ill. 322; *Bell v. Hewitt*, 24 Ind. 280; *Anding v. Davis*, 38 Miss. 574; *Donohoe v. Lea*, 1 Swan, 119.

³ *Watts v. Watts*, L. R. 17 Eq. 217.

⁴ *Brown v. Thorndike*, 15 Pick. 388; *Wells v. Wells*, 35 Miss. 638; *Brush v. Brush*, 11 Ohio, 287; *Taggart v. Thompson*, 14 Penn. St. 149; *McNaughton v. McNaughton*, 34 N. Y. 201.

devise pro tanto by withdrawing the devised interest from its operation; but the devisee still takes the inheritance, subject to the lease, and with it, of course, the rent reserved.¹ So a testator, having devised lands in fee, conveys them to the use of himself for life, with remainder to the use of his wife for life. This conveyance revokes the devise pro tanto, while the reversion in fee, expectant upon the death of the testator's wife, passes to the devisee.²

Under statute giving effect to all devises or legacies of property which the testator has power to dispose of at his death, it is plain that void conveyances made after the will have no effect upon it. Yet apart from such legislation the contrary would perhaps be true, on the ground of the inconsistency of the attempted conveyance with the prior gift by will. It was so held in England prior to the Wills Act of the present reign; an example being where the failure of the conveyance arose from some want of ceremony essential to the instrument.³ If the subsequent conveyance were only voidable, the case would be different, for if voidable at the election of the grantee, the testator would have no power over the estate, and if voidable at the election of the testator, he has not elected to avoid it. In either case, then, the gift by the will is revoked.⁴

¹ Jarman, 132.

² Id. 'In both the preceding examples it will be perceived that the conveyance is not only partial in its object, but in its operation. It does not for a moment disturb the testator's seisin of or his estate in the inheritance, and therefore can have no revoking effect beyond the estate which it substantially alienates and vests in another person.' Id.

³ *Walton v. Walton*, 7 Johns. Ch. 269; Jarman, 133.

⁴ Sed qu. if the conveyance were voidable by the testator for some reason, as fraud, not discovered until after his death. If then the conveyance were set aside, would not the devisee take the interest devised?

EXPRESS REVOCATION BY WILL, CODICIL, OR WRITING.

A will or a codicil may operate as a revocation of a prior testamentary instrument by effect either of an express clause of revocation or of an inconsistent disposition of the previously-devised property.¹ That the testator did not, as a matter of fact, intend to revoke his former gift is immaterial; such intention should have been shown in the later revoking instrument.²

Express revocation, being a matter of language, should be examined to see whether it states an actual, present revocation, or only a design to revoke at some future time. The latter, until carried out by actual revocation, would avail nothing,³ even though in will or codicil; as where in a later will the testator says, 'I will revoke my former will,'⁴ or where the testator intimates his intention to make some different disposition afterwards, from the one he is now making.⁵ The question whether the language amounts to a revocation is, however, one of intention;⁶ the intention to revoke should be beyond surmise, and should not be extended any further than the plain language of revocation requires,⁷ that is, any

¹ Jarman, 134; *Gordon v. Whitlock*, 92 Va. 723; *Cheever v. North*, 106 Mich. 390; *Burns v. Travis*, 117 Ind. 44; *Bradish v. McClellan*, 100 Penn. St. 607.

² *Wurzell v. Beckman*, 52 Mich. 478.

³ *Brown v. Thorndike*, 15 Pick. 388; *Rife's Appeal*, 110 Penn. St. 232.

⁴ Jarman, 134.

⁵ *Thomas v. Evans*, 2 East, 488. There the will read, 'As to the rest of my real and personal estate, I intend to dispose of the same by a codicil to this my will, hereafter to be made.' This was held no revocation of anything in the will.

⁶ *Gelbke v. Gelbke*, 88 Ala. 427; *Bradish v. McClellan*, 100 Penn. St. 607.

⁷ *In re Freme's Contract*, 1895, 2 Ch. 778, 783, Lindley, L. J.; *id.* 256.

further than is necessary to give effect to the codicil.¹ The two instruments should be read together to discover the extent of the intended revocation, where there is any ground for doubt.²

IMPLIED REVOCATION BY WILL OR CODICIL.

One's last will does not necessarily revoke one's prior will or wills; to be revocatory the last will, if it does
 Inconsistency not expressly revoke those previously made,
 necessary. must be inconsistent with the prior will or
 wills.³ A simple instance of the last-named kind of
 revocation may be seen in a case in which a testator
 devises a piece of land to A in one will, and afterwards
 devises the same piece of land to B. Where two parts
 of the *same* devise are seemingly inconsistent, the courts
 will endeavor to reconcile the parts by declaring that the
 devisees shall take concurrently; but where, as in the
 case just put, the inconsistency is between different
 wills, the courts are not so anxious to reconcile the two,
 and the last will is treated as revocatory.⁴

Still the case is one of intention, and the two wills are

¹ *Pendergast v. Tibbetts*, 164 Mass. 270, 272; *Chapin v. Parker*, 157 Mass. 63; *Tilden v. Tilden*, 13 Gray, 103; *Morley v. Rennoldson*, 1895, 1 Ch. 449, 454, *Lindley, L. J.*; *Redfield v. Redfield*, 126 N. Y. 466; *Viele v. Keeler*, 129 N. Y. 190, 199; *Kinkele v. Wilson*, 151 N. Y. 269, 277.

² *Gray v. Sherman*, 5 Allen, 198; *Richardson v. Willis*, 163 Mass. 130, 132; *Pendergast v. Tibbetts*, *supra*; *Morley v. Rennoldson*, *supra*.

³ *Cheever v. North*, 106 Mich. 390; *Gordon v. Whitlock*, 92 Va. 723.

⁴ *Jarman*, 136. 'And the distinction seems to be reasonable; for though it may be very unlikely that a testator should wholly change the object of the devise in the short interval between his passing from one part of the will to the other, there is no such improbability that, in the longer lapse of time between the execution of two testamentary papers of different dates, such a change of purpose should have occurred.' *Id.*

to be reconciled if their language reasonably permits. Thus a gift to A of a particular residue in one will, followed by a codicil containing a gift of a general residue of the testator's estate to B, is not a case of inconsistency if the language is such that the two may embrace different property.¹

Where, however, there is real inconsistency the last will in point of time — it makes no difference whether it is expressed to be the last will or not — must prevail.² But if from lack of dates Doubt as to latest instrument. or other evidence of time the court cannot decide which of the wills was executed last, both (or all) must be rejected, and the estate distributed under the intestacy laws. But that is a last escape out of difficulty, and will not be resorted to unless all other means fail. Even where the times of execution of the respective inconsistent documents are known, the court will, if possible, adopt a construction which will give some effect to each, sacrificing the earlier so far only as it is clearly irreconcilable with the later.³

The inclination to such a construction as would preserve, wholly or partly, the contents of the prior will, however, exists only in two cases: (1) when Construction of revoking words. the later is inadequate to dispose of the whole property, so that the consequence of rejecting the earlier one would be to produce partial

¹ *Inglefield v. Coghlan*, 2 Coll. 247.

² *Gordon v. Whitlock*, 92 Va. 723; *Teacle's Estate*, 153 Penn. St. 219; *Cheever v. North*, 106 Mich. 390.

³ *Austin v. Oakes*, 117 N. Y. 577; *Jarman*, 137. 'You are not to guess at the revocation, or to extend it further than the clear language of the revoking instrument requires you to do.' *Lindley, L. J.*, in *In re Freme's Contract*, 1895, 2 Ch. 778, 783; *id.* 256. This was said of a revoking codicil, and must apply all the more to the subject of the text.

intestacy;¹ or (2) where the later one is styled a codicil. The office of a codicil being to vary or add to and not wholly to supplant a prior will, such designation of the instrument seems to demand that some part of the will, whose existence it recognizes, should be sustained, if possible.² If the later instrument is not called a codicil, and is adequate to carry the whole property contained in the first, it will be held to be a revocation.³

CODICIL, HOW FAR DISTURBING WILL.

It is indeed an established rule of construction that the terms of a codicil must not disturb those of the will further than is absolutely necessary to give to them reasonable effect.⁴ So strong indeed is this rule that an expressed intention in a codicil to change the will in one particular negatives presumptively any intention to change it elsewhere.⁵ Another rule that is to be inferred from what has been said is that where the will contains a clear and unambiguous disposition of property, real or personal, such gift is not to be considered as revoked by doubtful expressions in a codicil.⁶ Still an intention to revoke, though loosely expressed, or expressed in terms capable in themselves of limited interpretation, must prevail.⁷

¹ See *Teacle's Estate*, 153 Penn. St. 219, 223.

² *Jarman*, 138, the whole paragraph.

³ *Id.*; *Henfrey v. Henfrey*, 2 Curteis, 468; s. c. 6 Jur. 355.

⁴ *Whelen's Estate*, 175 Penn. St. 23; *Grimball v. Patton*, 70 Ala. 626; *Buchanan v. Lloyd*, 64 Md. 306; *Crozier v. Bray*, 120 N. Y. 366; *Hallyburton v. Carson*, 86 N. C. 290; *Reichard's Appeal*, 116 Penn. St. 232; *Rodgers v. Rodgers*, 6 Heisk. 489; *Pendergast v. Tibbetts*, 164 Mass. 270, 272; and cases cited ante, p. 136.

⁵ *Quincy v. Rogers*, 9 Cush. 291; *Vaughan v. Bunch*, 53 Miss. 513.

⁶ *Johns Hopkins Univ. v. Pinckney*, 55 Md. 365; *Joiner v. Joiner*, 2 Jones, Eq. 68; *Jarman*, 145.

⁷ *Jarman*, 146.

MISTAKE: CONDITIONAL REVOCATION.

Like the case of the destruction of a will by mistake, if a testator by codicil revokes a gift in his will, or in a previous codicil, basing the revocation upon the ground of the assumption of a particular fact, which assumption turns out to be untrue, the revocation does not take effect. The act is treated as conditional, depending upon a contingency which fails.¹ A testator having bequeathed to each of the two grandchildren of his late sister a certain sum, afterwards, by codicil, declared that he revoked the gifts to such grandchildren, 'they being all dead.' The fact was that they were living, and the court held that the gifts to them were not revoked.²

If the fact stated is plainly immaterial, the rule does not prevail. Thus where a bequest was revoked on the ground, as stated in a codicil, that the testator had 'given' the person certain things, when in fact he had sold them to him, it was held that the revocation was not affected by the misstatement.³ The mistake must, it seems, appear in some statement in the will, and it should appear what would have been the testator's intention but for the mistake.⁴ Perhaps, too, the revocation will prevail where the testator, instead of making the particular fact itself the ground of revocation, makes his mere belief of it, or some advice he has received in the matter, the ground of his act;⁵ for the testator clearly

¹ *Giddings v. Giddings*, 65 Conn. 149, 157; *Mendinhall's Appeal*, 124 Penn. St. 387; *Barclay v. Maskelyne*, Johns. 124; *Allen v. Bewsey*, 7 Ch. D. 453, 464.

² *Campbell v. French*, 3 Ves. 321.

³ *Mendinhall's Appeal*, *supra*.

⁴ *Gifford v. Dyer*, 2 R. I. 99; *Giddings v. Giddings*, 65 Conn. 149, 157.

⁵ *Skipwith v. Cabell*, 19 Gratt. 758; *Jarman*, 147; *Attorney-Gen. v. Lloyd*, 3 Atk. 552; s. c. 1 Ves. 32; *Newton v. Newton*, 12 Ir. Ch. Rep. 118. But see *Thomas v. Howell*, L. R. 18 Eq. 198, 209.

may, if he will, judge for himself of the truth or falsity, existence or non-existence, of the fact.¹

CODICIL REVIVING EARLIER OF TWO WILLS.

The later of two inconsistent wills, revokes, as we have seen, the earlier one, or the later may expressly
 Intermediate will. revoke the earlier. If, then, after such a state of things, the testator should execute a codicil, in which he should refer to and recognize the earlier of the two wills as his last will, or as his real will, or simply as his will, the earlier will would be revived, and the later one would be revoked so far as it was inconsistent with the prior one and the codicil.² This would be true though the codicil made no reference to the later will, in terms of revocation of it. The testator may, however, make the question a difficult one by some mistake in referring to the wills; as, for instance, where in the codicil he sets up 'my last will, dated Jan. 1, 1890,'³ which in fact is the date of the first will. The question will then be one of construction of the language used. In the case just referred to it was held that the testator really meant his last will in time of execution, the date being a mistake.

This doctrine, however, of setting up the first of two wills, applies to the case of earlier and later wills strictly,
 Codicil as part of will. and this important fact should be observed: Every *codicil* is a constituent part of the will to which it relates, for in a general and comprehen-

¹ Giddings v. Giddings, 65 Conn. 149, 157.

² Crosbie v. Macdonal, 4 Ves. 610; Payne v. Trappes, 11 Jar. 854; McLeod v. McNab, 1891, A. C. 471. Under statute there should be evidence of an intention to revive the earlier will; a mere reference to it would not be enough. Last case.

³ In re Ince, 2 P. D. 111.

sive sense a will consists of the aggregate contents of all the papers through which it is dispersed. Therefore where a testator in a codicil refers to and confirms a revoked will, it is not necessarily to be inferred that he means to set up the will (in the special, restricted sense) against and in revocation of any intermediate codicil or codicils which he may have added to it. He is rather to be considered as confirming the will with every codicil which may belong to it. Thus a testator, after making his will, executed several codicils to it, somewhat changing the dispositions of the will; he then added another codicil, referring to the will *by date*, and changed one of the trustees and executors, in all other respects expressly confirming the will. It was held that this confirmation did not revive the parts of it which had been altered or revoked by the preceding codicils. Will and codicils stood, as the codicils left the case, apart from the one change made by the last codicil.¹

This, too, is a matter of intention, to be found upon the face of the reference, and the testator may act in the matter as he will, revoking any or all of the prior codicils. Indeed a reference to the 'will' by date, confirming it, appears to be considered as setting up the will to the exclusion of the intermediate codicils; that is, revoking them, so far as they are inconsistent with the 'will,' as if they were themselves wills which had revoked the earlier instrument.² This, however, comes near to relaxing the close connection generally supposed to exist between will and codicil.³

¹ *Crosbie v. Macdoul*, 4 Ves. 610. The whole paragraph from Jarman, 153.

² *Burton v. Newbery*, 1 Ch. D. 234.

³ The English editor of Jarman, 154, adds of this case: '*Crosbie v. Macdoul* is treated as a case where the intermediate codicil was not revoked, rather than as one where it was actively confirmed. According to this, the direct action of the latest codicil is upon the instrument

called the will, and on that only. The codicil is left untouched, and operates by its own inherent force, if it has any; and the ultimate result is, that the will is confirmed as modified by the codicil. If that is the correct view of the case, it will not govern one where the intermediate codicil has previously been revoked with the will to which it belonged, and where therefore it has no force except such, if any, as may be supplied by the subsequent codicil.' The reader should notice the further comments of the editor, which leave some doubt whether *Burton v. Newbery* gives sufficient force to *Crosbie v. Macdoul*. See *In re de la Saussaye*, L. R. 3 P. & D. 42; *Green v. Tribe*, 9 Ch. D. 238.

CHAPTER XIII.

REPUBLICATION.

A TESTATOR may expressly or constructively republish his will. He republishes the will expressly when he repeats the acts necessary for the execution of a will, with avowed design to republish.¹ Express and constructive republication. He republishes the will constructively when, for some other purpose, stated or not, he makes a codicil to it.²

Republication, express or constructive, cures defects in the execution of the will, gives to it validity when it was executed under undue influence or when the testator was incompetent for any reason Effect of republication. to execute the will, provided, of course, that the republishing was itself valid. It also has the effect to make the will speak from the date of the republication, so that, wholly apart from the statutes giving testamentary power over all lands which the testator dies seised of, a residuary gift of property in the will will carry property owned by the testator at the time of the republication.³

¹ *Love v. Johnson*, 12 Ired. 355.

² *Jarman*, 157. See, e. g., *In re Champion*, 1893, 1 Ch. 101, 109; *Giddings v. Giddings*, 65 Conn. 149, 160; *Hobart v. Hobart*, 154 Ill. 610.

³ *In re Champion*, 1893, 1 Ch. 101, 109, 115.

But to give to republication the effect of passing estates acquired between the date of the will and the date of the republication, the words of the will must be such as, if used at the date of the republication, would include the estate in question. If the language of the original will be such as, if used at the date of the republication, would not include the after-acquired estate; or if the act of republication be accompanied by other provisions indicating that it was the testator's intent to limit the operation of the will as republished to the same estate which was given and would by law pass by the original will; then in either case, notwithstanding such republication, the devise will not include the after-acquired estate.¹

There are other limitations upon the effect of republication which should be noticed. That act will not invest with the force of gift expressions which did not have such force in the will, nor will it alter the construction of the will so as to cure defective expressions therein. It will not extend a specific gift to property not intended by such gift though answering to the description by which such gift was made; it will not revive a gift to one who has already died in the lifetime of the testator, in favor of another person of the same name and relationship to the testator since born; it will not revive a legacy to a child which has been adeemed or satisfied by a later advancement to the legatee.² To do such things there must be something more than republication; an intention to do them must be expressed by the testator — expressed, too, in a way which the law will recognize, as by plain language in a codicil.³

¹ *Haven v. Foster*, 14 Pick. 541.

² *Tanton v. Keller*, 167 Ill. 129, 143; *Izard v. Hurst*, 2 Freem. 224; *Booker v. Allen*, 2 Russ. & M. 270; *Powys v. Mansfield*, 3 Mylne & C. 376.

³ *Jarman*, 158, 159.

Under the legislation which makes devises operate upon after-acquired estates, where the intent that it shall so operate is shown, the republication ^{After-acquired} of a will has lost much of its importance ^{estates.} in that particular. In other respects, the efficacy of a codicil as a republication remains unaffected. Thus a will executed under undue influence may afterwards be republished and confirmed by a codicil executed when the testator is free from the influence.¹

A codicil duly executed will presumptively operate as a republication of the will to which it refers, whether the codicil is annexed to the will or not, or ^{Republication} whether it is or is not expressly confirm- ^{by codicil.} atory of it; for every codicil is in law part of a man's will, whether the will is described in the codicil or not.² But if it appears on the face of the codicil that it was not the intention of the testator to republish, that intention will prevail.³

¹ O'Neill v. Farr, 1 Rich. 80.

² Brown v. Clark, 77 N. Y. 369.

³ Neff's Appeal, 48 Penn. St. 501.

PART III.

THE CONSTRUING OF A WILL.

The Nature of a Will having been ascertained, the next subject of inquiry is, how the will is, if need be, to be construed.

CHAPTER XIV.

CONSTRUCTION.

REMARKS UPON THE SUBJECT: CLASSIFICATION.

WHEN the language of a will¹ is materially and legitimately affected by the context or other language of the instrument, or by its relation to external facts, or when it is elliptical, occasion arises for ascertaining, if possible, its meaning. Ascertaining the meaning of language in such cases is called construction; and to that business construction is limited. Words, phrases, or sentences (in a will) whose meaning appears upon their face, or only requires definition of the primary meaning, or translation, cannot be made the subject of *construction*, even though the language be ungrammatically and awkwardly expressed; there must be question whether the language is to be taken in its primary sense to make a case for construction. If no such question is raised, the language must be taken in the sense which it bears upon its face.² Construction is the harmonizing of language drawn in question, or it is the resolving doubt into certainty; the

What language calls for construction: limits of construction.

¹ The word 'will,' together with the word 'instrument' following, must be understood to include all codicils and other testamentary documents.

² 'If by the use of plain and unambiguous words' a testator 'has made his meaning clear and certain, his will expounds itself, and all the court can do, or has power to do, is to give effect to his purposes.' *Marshall v. Hadley*, 50 N. J. Eq. 547, 551, *Van Fleet*, V. C. It matters not that the result is nonsensical or absurd. *Id.*

essential object, indeed the only justification, of construction is the turning of uncertainty — of person, property, or other thing — into certainty.

Nay, even doubt in regard to the meaning of language does not necessarily make a case for construction. Language may not be understood, it may even be *misunderstood*, by the layman, when in fact or in legal usage it has a perfectly definite primary meaning. Construction cannot be applied to such a thing, unless some doubt is thrown upon the primary meaning of the language. The rule in *Shelley's Case*¹ affords a familiar illustration. The language to which that rule applies might well be misunderstood by a layman, and yet the rule which declares the meaning of the language is not a rule of construction.² In legal usage, apart at least from statutory law, there is no doubt of the meaning of an estate to A for life and after his death to his heirs; the fact that a layman may misunderstand the language is no ground for saying that the language is to be construed, and so to receive a meaning different from its primary one.

The language of the courts is itself sometimes misleading in regard to the proper function of construction.

Thus when the only real question is of the primary meaning of a word or phrase — that is, in a case in which the meaning of the word is not affected by other words or by external facts — it is sometimes said that the word is 'construed' to mean so-and-so. That is a misnomer and misleading; the case is merely one of definition.³

¹ 1 Coke, 93, 104 a.

² Jarman, 1177.

³ In fixing upon the secondary meaning of words, however, construction ends in definition.

A striking instance of the kind is found in what are called precatory trusts, where a testator, instead of using apt or unmistakable words of trust, entreats, suggests, or advises his devisee or legatee to dispose of the property, or some part of it, in a particular way stated in the will. Now what the words used by the testator mean, where their meaning is not disclosed or affected by other words of the will — that is, whether ‘entreaty,’ ‘suggestion,’ ‘advice,’ or the like imports obligation to do the thing — is purely a question of primary definition. If the courts have gone wrong in such cases, as formerly they were apt to do, that is a case of bad definition, not a case of construction in the proper sense; there was nothing to ‘construct.’ The primary meaning of a word or phrase cannot be changed by calling definition construction.¹

¹ It results that if the courts had never gone wrong in these cases of precatory trusts, there would not be much ‘law’ upon the subject. A large part of the ‘law’ is found in the wrong meaning which the courts have given to the precatory words. If it were not for that, it would not be so necessary to consult books to see whether words of entreaty, advice, and the like amount to command, so as to impose a binding duty. The tendency of the decisions until quite recent times was plainly towards treating such words as obligatory, creating a trust. *Massey v. Sherman*, Ambl. 520; 1 Atk. 389; *Malim v. Keighley*, 2 Ves. 333, 529 a; *Prevost v. Clarke*, 2 Madd. 458; *Briggs v. Penny*, 3 DeG. & S. 539 (‘trusting that’); *Warner v. Bates*, 98 Mass. 274 (‘in full confidence’); *Knox v. Knox*, 59 Wis. 172 (‘having full confidence’); *Noe v. Kern*, 93 Mo. 367 (‘in full faith’); *Cox v. Wills*, 49 N. J. Eq. 130, 573 (‘in good faith believing’); and many other cases. See *Eberhardt v. Perolin*, 48 N. J. Eq. 592. But under authorities now current, the words are coming to be taken in their natural sense, thus removing the subject, so far as the doubts created by the older authorities have been removed, from the law. The true place for such questions, in a sound administration of the law, is the dictionary. It has come to be recognized that while ‘I wish’ is enough for a mere gift by the testator, it is not enough for a gift in trust to a beneficiary. *Bellas’s Estate*, 176 Penn. St. 122, 130; *Boyle v. Boyle*, Penn. St. 108,

Another case in which definition is easily confused with construction arises from words of which the popular, being the primary, sense is so broad that it is likely to cover more than testators in using them could fairly be thought to intend. In such cases the courts find it necessary to

113; *Cressler's Estate*, 161 Penn. St. 427, 433; *Burt v. Herron*, 66 Penn. St. 400. That distinction should be well observed.

The following, together with those just cited, are some of the late cases: Gift to the testator's wife 'in full confidence' that she will do right in disposing of the property between his children in her lifetime or by will. This was considered as not creating any trust, and the wife accordingly took absolutely. *In re Adams*, 24 Ch. D. 199; s. c. 27 Ch. D. 394. To the testator's wife, 'feeling confident' that she would act justly to their children by dividing the property equally between them. The wife took absolutely. *Mussourie Bank v. Raynor*, 7 App. Cas. 321. Still more pointedly: Gift of all the estate of the testatrix to her daughter, adding, 'my desire [is] that she allow to A an annuity of £25 during her life.' This was held insufficient to create a trust. *In re Diggles*, 39 Ch. D. 253. With equal point: Gift to nieces of a sum of money 'for their sole and separate use . . . and I wish them to bequeath the same equally between the families of my nephew A and my niece B, in such mode as they shall consider right.' This was held not to create a trust. *In re Hamilton*, 1895, 2 Ch. 370, the court refusing to follow *Malim v. Keighley*, 2 Ves. 333, 529 a, formerly considered a case of authority. Lindley, L. J., now said: 'We are bound to see that the beneficiaries are not made trustees unless intended to be made so by their testator. . . . If you come to the conclusion that no trust was intended, you say so, although previous judges have said the contrary on some wills more or less similar.' See the same case in the court below, 1895, 1 Ch. 373. So *In re Williams*, 1897, 2 Ch. 12, 'in the fullest trust and confidence,' held not enough. To the same effect *Durant v. Smith*, 159 Mass. 229, where the word used was 'request'; *Sturgis v. Paine*, 146 Mass. 354; *Sears v. Cunningham*, 122 Mass. 538 ('I wish'); *Taylor v. Brown*, 88 Maine, 56; *Clay v. Wood*, 153 N. Y. 134. But some courts still resist the current. See the late New Jersey cases, *supra*.

It is to be observed, however, that the difficulty in the way of treating the gift as a gift in trust *may* be that the trust is not sufficiently definite, rather than that the precatory words are not sufficient. Compare *Olliffe v. Wells*, 130 Mass. 221; *Smith v. Smith*, 54 N. J. Eq. 1.

restrict the definition to limits which might justly meet the testator's intention; but as it is not the context or other language of the will, or external facts, that create the difficulty, the case is one of definition only, not of construction.

An illustration may be seen in the word 'relations' or 'relatives.' In its popular sense this is a word of the widest range, embracing persons of every degree of consanguinity. Obviously, if the word were to be taken in such broad sense in the language of a will, it would cause the courts embarrassment; they would often¹ have to declare a gift to 'relations' unexplained as void for uncertainty, a very undesirable thing in view of the fact that such gifts are common. The courts therefore narrow the meaning; they restrict it, in the first place, to relations in wedlock,² and then they as justly resort to the statutes of distribution in the case of gifts of personalty, and perhaps of descent in the case of gifts of realty, as an indication of the class of persons entitled to take in intestacy, and decree the disposition accordingly, in the absence of explanation on the face of the will.³ The effect of this is, to establish a primary legal

¹ Not always; a person might bequeath his property to his 'relations,' having but two or three relations living.

² In *re Jodrell*, 1891, A. C. 304, 305; In *re Fish*, 1894, 2 Ch. 83 ('niece'); In *re Deakin*, 1894, 3 Ch. 565. See *Pastene v. Bonini*, 166 Mass. 85 ('my wife'). But that probably agrees with the primary popular meaning.

³ *Cox v. Wills*, 49 N. J. Eq. 130, 573; *Varrell v. Wendell*, 20 N. H. 431; *Drew v. Wakefield*, 54 Maine, 291; *Gallagher v. Crooks*, 132 N. Y. 338, 343. See *Elliot v. Fessenden*, 83 Maine, 179; *Cleaver v. Cleaver*, 39 Wis. 96; *Kimball v. Story*, 108 Mass. 382; *Horton v. Earle*, 162 Mass. 448 (a brother-in-law not a 'relation').

'Representatives' may also mean distributees under the statutes. *Bates, Petitioner*, 159 Mass. 252, 258. But the word has been a troublesome one. See *Jarman*, 957-967.

Husband and wife are not 'next of kin' under the statutes. *Platt v. Mickle*, 137 N. Y. 106.

meaning of the word, which accordingly may be the basis of construction whenever that meaning is drawn in question.¹

Let it be clearly understood, then, that construction, when not dealing with ellipsis of intention, is concerned only with language whose primary meaning is drawn in question by the context or other related language or by external facts, and that the primary meaning of the words is the starting-point for construction in such cases. In cases of ellipsis of intention, as distinguished from mere verbal ellipsis where the meaning is plain, construction in many cases supplies the omission; but it is still plainly resolving uncertainty into certainty, and not meddling with language whose meaning is not drawn in question by other legitimate influence. Indeed here too the primary meaning of words may be drawn in question, as e. g. if a testator should make A his 'residuary legatee,' without words of gift of the residue.²

Construction works out its purpose (1) by interpretation, or (2) by means of rules, or (3) by both methods together. The legal theory of the difference between the first and second methods proceeds is this: The first method proceeds upon the ground that the primary sense of language of the will is drawn in question, but that the testator's intention is, taken altogether, intelligibly and completely expressed in

¹ There are many other cases of definition which are loosely spoken of as construction. The word 'children' is 'construed' *prima facie* to denote only immediate offspring; it is 'construed' to exclude illegitimates. This is nothing but definition of the primary meaning, assuming that the word stands unaffected by anything within or without the will. To follow up such cases would be an endless pursuit; and a chapter on the subject would be only a dictionary.

² See chapter xxiii., at end.

the language of the will, and therefore that the language needs only to be put together — constructed — properly, in other words, sensibly interpreted, to bring out the very intention of the testator. This is the primary method of construction.¹ The second method ordinarily proceeds upon the ground that the intention is not completely or is not intelligibly expressed, — that there is an ellipsis of something material to the purpose of the testator, which may properly be supplied. To supply the ellipsis in such a way as, in most cases, to bring about a just result, rules of construction have been framed from time to time, as a preferable course to rejecting the disposition for uncertainty or leaving the case to the particular judge or jury to surmise at what the testator may have had in mind.² The law, in other words, completes the idea which the testator left incomplete, in the cases in which it has been deemed advisable to complete it.³ This is the secondary method

¹ *Collier v. Walters*, L. R. 17 Eq. 252 ; *In re James*, 146 N. Y. 78, 100.

² Surmising is never allowable. *In re Cleveland*, 1893, 3 Ch. 244, 251 ; *infra*.

³ The use of these rules of construction is often explained in terms of presumptive intention ; it is said that they lead by (*prima facie*) presumption to the intention the testator would have had, had his attention been sufficiently called to the case. But the explanation is fictitious. The testator had no intention in the matter, so far as the will indicates, and not only is nothing gained by supposing what his intention might have been, the explanation is dangerous, as implying the right of the courts to surmise at the testator's intention. It is better to say that the law supplies an omission in certain proper cases ; that, certainly, is the fact.

In a case touching interest not disposed of by the testator, Kekewich, J., says that he shall apply 'one of those technical rules invented by the court for the purpose of giving effect to what no doubt is in *average instances* the intention of the testator.' *In re Inman*, 1893, 3 Ch. 518, 520. The rules would in 'average instances' lead to the intention of the testator if he had had any intention in the matter.

of construction, sometimes called the subordinate method.¹

Primary construction may accordingly be said to be the clearing away of doubts in regard to the primary meaning of language, and then applying that meaning,² or the finding and applying the secondary meaning of language; secondary or subordinate construction, failing the primary, the supplying an omission consisting in some imperfectly or incompletely expressed intention of the testator.

It should be remarked, however, that there are cases for rules of construction in which the object is to hold the testator to the legal effect of certain words already used, by eliminating subsequent (or at least other) words inconsistent with the same.³ The rule of repugnancy, considered later, is a case of the kind. Perhaps this is not, in itself, construction at all, but it commonly involves construction in the proper sense, — so commonly that it is desirable to consider the subject under the head of construction.

It follows from what has been said that in the cases in which the first method is employed there may or may not in law be any actual uncertainty in the testator's meaning, while the second method always deals with real uncertainty. Generally speaking, the second method is not to be resorted

Construction defined in its two parts.

The theory of construction explained.

¹ *Collier v. Walters*, supra. See infra, p. 157, note.

² It happens not infrequently that the courts find that doubts raised by the context, as to whether language is to be taken in its primary sense, are removed by construction, and the primary meaning after all found the one to be applied. See, e. g., *Jackson v. Jackson*, 153 Mass. 374, 377, and *Ralph v. Carrick*, 11 Ch. D. 873, in regard to the word 'issue.' See also *Olney v. Lovering*, 167 Mass. 446, 448; *Fabens v. Fabens*, 141 Mass. 395; post, chapter xv.

³ But even here the courts should follow the testator's intention as far as possible. In *re Lowman*, 1895, 2 Ch. 348. See chapter xvi.

to if the first is sufficient. But no hard and fast rule can be laid down for the application of either method; either may give way upon slight occasion. All that it is intended to suggest here is the theory upon which the courts have acted in framing rules of construction. Such rules are framed, not because construction should be fettered by rules, but as a sort of plank in a shipwreck. Where they are not needed, they are likely to be harmful, and will not be used.¹ But while simple interpretation is to be considered the primary method, construction by rules is certainly no less needful, and perhaps, in general, no less trustworthy in its results.² Indeed

¹ See *In re James*, 146 N. Y. 78, 100, Gray, J.: 'It is only where the instrument fails to express or to disclose an intention, that we must resort to the rules which have been established by the decisions of the courts.' See also *Clarke v. Clarke*, 145 N. Y. 476, 480, 481. After distinguishing away a certain rule of construction, Lord Herschell said, in *In re Dallmeyer*, 1896, 1 Ch. 372, 386: 'I feel free, therefore, to allow myself to be guided by what appears to me the intention of the testator as indicated by the language he has used, untrammelled by any technical rule.'

See *In re Somers-Cocks*, 1895, 2 Ch. 449, where, to the contention that marshalling should be applied, the court said: 'As I understand the cases, the court finds words to which effect must be given, and says: "We cannot give full effect to that except by the process of marshalling, and therefore you must marshal." The reason for the court so deciding is, not because the testator has directed marshalling, but because marshalling is the only way by which the direction the testator has given can be carried into effect.' And the learned judge declined to order a marshalling; but the only point intended by the quotation is to show when the use of rules is proper.

² A remark of Sir George Jessel, M. R., in *Collicr v. Walters*, L. R. 17 Eq. 252, appears to be in point. The Master of the Rolls, having said that a gift to trustees and their heirs prima facie conferred the fee, says of such rules of construction: 'They have properly been called subordinate rules, because the primary rule is to ascertain the meaning of the expressions in the will from the will itself; but in so ascertaining it, these subordinate rules become of importance.' Quoted by Stirling, J., in *In re Townsend*, 1895, 1 Ch. 716, 721. The Master of the Rolls

the statesmanship of the judges is seldom seen to such advantage as here.¹

The difference in operation between the two methods of construction, which later will be worked out in detail, may be shown sufficiently for the present by one or two simple illustrations. A testator devises Blackacre to A for life, and after A's death to his issue, but in case *such children* all die under the age of twenty-one years, then over to B. The meaning of the testator here is completely and intelligibly expressed; it is plain that the primary meaning of 'issue,' all one's posterity, is affected materially, and it is plain how it is affected, by the words 'such children;' the word means children. Thus simple interpretation shows the actual intention of the testator, and the use of rules is excluded; to apply any rule of construction to a plain case like that would be to make certainty uncertain.

But suppose that the testator devised the land to A

here evidently refers to *Poad v. Watson*, 6 El. & B. 606 (also quoted in *In re Townsend*), where Coleridge, J., says: 'The paramount rule is to look to the intention as appearing on the whole will. But there are secondary rules, one of which is,' &c.

¹ It should not be inferred from the text that there is no danger in framing rules to supply an omission of the testator. Though such rules are generally trustworthy, sometimes experience has proved a rule to be unfortunate. An instance in point is referred to in *In re Horlock*, 1895, 1 Ch. 516, 518, where Stirling, J., says: 'The general rule is established that where a testator gives to a creditor a legacy of equal or greater amount [than the debt], that is a satisfaction of the debt. That rule was established early in the last century; but no sooner was it established than learned judges of great eminence expressed their disapproval of it, and invented ways to get out of it.'

Still it is true that in the framing of these rules of construction, some but not all of which will appear in the following pages, the very spirit of sound theory and statesmanship may be seen.

for life, and after A's death to his issue, their heirs and assigns forever, as tenants in common. Now in this case the meaning of 'issue,' as a new question, is not completely and intelligibly expressed; but that the testator has used the word out of its primary signification is plain. For, taken in its primary sense, the word is a word of limitation, merely describing the estate of A; to A for life, and after his death to his issue, would give A, apart from statute, an estate tail. But 'issue' in the primary sense of all one's posterity cannot possibly take as tenants in common; and simple interpretation has no help for the case. Here, then, is a possible case for secondary construction, and the case being a common one we find that secondary construction has provided for it; where there is a devise to one, with remainder to one's issue as tenants in common, with a limitation to the heirs general of the issue, the issue take as purchasers in fee.¹

The boundary line between the two methods however, is, necessarily, and perhaps fortunately, indistinct. Indeed there is no boundary line between them; there is only a borderland, occupied more or less by each. Boundary between the two methods not distinct. An incomplete gift should fail for uncertainty, unless there be some rule of construction to supply the omission of intention; but when is a gift 'incomplete'? Is it 'incomplete' simply because the language of the testator is doubtful? Clearly not; that is the common case for simple interpretation. But it may be so doubtful that there can be no certainty what the testator meant; in such a case may simple interpretation act as secondary construction might, and supply the omission? It ought not to do so, in principle; but it would be unsafe to say that simple interpretation

¹ Parke, B., in *Slater v. Dangerfield*, 15 Mees. & W. 273.

never acts in such cases. On the other hand, a rule of construction is sometimes laid down in a case in which the method used was simple interpretation; because of the fact that the case is a common one, about which doubt is just possible, and it is deemed best to settle the interpretation beyond further question. Thus a testator devised land to trustees upon trust for six persons for their lives, and after the death of all to sell the land and divide the proceeds 'amongst their several heirs.' The word 'heirs' was construed to mean children. It was a case of simple interpretation; but as if to leave no escape from the construction in the future, the court was of opinion that wherever there was a gift of personalty (here the land had been converted into personalty by the direction to sell) to a person for life, and after his death 'amongst his heirs,' the last word means children.¹ Other instances of the same tendency will be seen in the next chapter.

We shall, indeed, in the following pages, find many cases in which it would be impossible to separate the two methods, so completely are they interwoven. And then with them definition, and the application of definition, will frequently be found playing an important part. The consequence is, that we shall not be able to draw hard and fast lines in classifying the subjects with which construction deals; the headings Primary Construction and Secondary Construction must be taken accordingly. They will serve only to indicate the main lines under consideration; under each head much that belongs to the other must necessarily appear, and with that, much that belongs to the closely related, but, as we have seen, different subject of definition. Many of the subjects must begin and be much occupied with mere definition,

¹ Bull v. Comberbach, 25 Beav. 540, Romilly, M. R.

as a necessary condition to any inquiry in regard to construction.

Whatever method of construction is applied in the particular case, it should be observed that the courts give every indulgence in favor of a will duly executed, however unskilful or ignorant the testator may have shown himself to be. No degree of informality, no amount of illiteracy, such as bad spelling, bad grammar, bad punctuation, or carelessness in using or omitting capitals,¹ or all these, no confusion or disorder of words or sentences will induce a court of justice to reject a will in whole or in part. The courts will diligently endeavor, in all cases, to ascertain the intention of the testator.

Fundamental
principles of
construction.

But the courts are not justified in surmising at the meaning of the testator,² much less in making a will for him;³ and accordingly, if after exhausting all methods of interpretation they cannot make anything out of the language, the result must inevitably follow; the instrument, so far as it is affected by the uncertainty, must fail,⁴ and the property in question pass under the laws of intestacy, or fall into the residue, according to circumstances.⁵

Another fundamental principle to be applied, whatever the method of construction, is that a testator is presumed to use the words of his will according to their strict and primary meaning, so far as they have a fixed meaning,

¹ *Kinkele v. Wilson*, 151 N. Y. 269.

² *Scalé v. Rawlins*, 1892, A. C. 342. The courts will not give expression to a supposed intention of the testator, which is not founded upon language of the will. In *re Cleveland*, 1893, 3 Ch. 244, 251.

³ In *re Cleveland*, 1893, 3 Ch. 244, 251.

⁴ *Asten v. Asten*, 1894, 3 Ch. 260; *Nelson v. Pomeroy*, 64 Conn. 257; *Hurd v. Shelton*, id. 496.

⁵ The residuary clause, if there be one, will carry gifts which fail. See chapter xxiii.

unless from the context it appears that he has used them in a different sense; in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed. But if the words, taken in their strict and primary sense, are sensible with reference to external circumstances, it is declared to be an inflexible rule that they shall be interpreted in that sense, and no other.¹ This 'rule,' however, tells one how to define a word, not how to find the meaning of a word affected by the context or by external facts.²

¹ *Quarm v. Quarm*, 1892, 1 Q. B. 184, 186, 187, Lord Coleridge, quoting the rules of Sir James Wigram. See *Hamilton v. Ritchie*, 1894, A. C. 310.

² There are other canons of interpretation called rules of construction, which are applicable to simple interpretation, such as the rules for and against rejecting words; but these are not generally rules in the sense of means of establishing a meaning — they are nothing but the plain requirements of common-sense in simple interpretation. True rules may, however, grow out of such cases, as will appear in chapter xvi.

CHAPTER XV.

PRIMARY CONSTRUCTION: INTERPRETATION.

WORDS.

THE branch of construction first to be considered is interpretation simply; the aim of which, as we have seen, is to find the actual intention of the testator from the very language which he has used, where the primary meaning of words used in the will has been materially affected by other words or by external facts. The object of the following pages will be to set forth the *method* by which the law works out its results, by examining certain words in common use in wills, modified as just intimated. The method of the law in matters of simple interpretation is about all that could be profitably considered, for here authority is at its lowest and is constantly disregarded; perhaps it is never binding in such cases.¹

¹ 'I have often,' said Halsbury, L. C., in *Scalé v. Rawlins*, 1892, A. C. 342, 343, 'had occasion to say of a case upon the construction of a will, That was a decision on a particular will, the judge looking at every word of the special clauses. How can it be an authority upon the construction of another and a different will?' Still stronger language is used by Lindley, L. J., in *In re Stone*, 1895, 2 Ch. 196, 200: 'When I see an intention clearly expressed in a will, and find no rule of law opposed to giving effect to it, I disregard previous cases.' The same learned judge, in another case where 'authorities' were urged, said: 'I always protest against anything of the sort. Many years ago the court slid into the bad habit of deciding one will by the previous decisions upon other wills.' In *re Morgan*, 1893, 3 Ch. 222, 228. Smith, L. J., in the same case, at p. 232: 'Reference to other cases on other wills is use-

Consider, first, words having a technical meaning in law.¹ Take, for instance, the word 'heir.' Now the real meaning of the word² being more or less obscured by the context or by some external fact, how, without help or hindrance of rules of construction, will the law set about to discover the sense in which the testator used the word? The answer will be seen by stating some of the cases with which the courts have dealt.³

A testator devised lands to A and his heirs during the life of B, in trust for B, and after B's death to the 'Heirs of body now living.' 'heirs male of the body of B now living,' and to such other heirs, male or female, as B might of his body have. B had a son living at the time of the making of the will; and the question was whether such son took the interest under the designation of 'heirs male of the body of B now living.' The answer was in the affirmative. The technical meaning of the word 'heirs' was overturned by the words 'now living,' and as there was a person then living who was heir apparent, he was the one intended.⁴

less, unless such cases lay down some canon of construction.' See also *Redding v. Rice*, 171 Penn. St. 301, 306; *Kent*, iv. 535, where it is said of the law of wills, that 'adjudged cases become of less authority, and are of more hazardous application, than decisions upon any other branch of the law.' These remarks, it should be observed, have more special application to cases of simple interpretation than to those of rules of construction.

¹ Presumptively such words are to be taken in their technical sense. *Lawton v. Corlies*, 127 N. Y. 100.

² *Fargo v. Miller*, 150 Mass. 225, 229.

³ It may be remarked that the words about to be examined may be the subject also of *rules* of construction; here they are considered only in their relation to simple interpretation.

⁴ *James v. Richardson*, T. Jones, 99; s. c. 1 Ventr. 334; 2 Lev. 232; 1 Lord Raym. 330. As to a gift 'to my heirs at law then surviv-

In another case a testator gave his real and personal estate to the 'heir-at-law' of A, and in case such heir-at-law should die without issue, then to the 'Heir-at-law': 'next heir-at-law' of A and his or her child. issue; and in case all the 'children' of A should die without issue, then to others. A was living at the date of the will and at the death of the testator, and had sons. It was held, under the law of primogeniture, that the eldest son was intended; the word 'children' having been used as the equivalent of 'heir-at-law' before used.¹

A testator devised estates to the heirs male of the body of A, his aunt, remainder to his own heirs. He also bequeathed a sum of money to A, and 'Heirs male.' another sum to her children, an annuity to B, his heir-at-law, out of the estates devised, and a legacy to B's children. A, who was living at the death of the testator, had sons, and the question was whether the eldest (under primogeniture law) was entitled under the description 'heirs male.' It was held that he was; the primary meaning of the word had been taken away by the fact that the testator had taken notice that the sons of A were living by giving legacies to her children, and that A was living by giving a legacy to her. So the testator had meant heir apparent by 'heirs male of the body.'²

ing,' at an event named, see *Wood v. Ballard*, 151 Mass. 324, 334. But in such cases the persons are legally heirs, the number only being in question.

¹ *Carne v. Roche*, 7 Bing. 226; s. c. 4 Moore & P. 862. See *Dawson v. Schaefer*, 52 N. J. Eq. 341, 345. But see *Ralston v. Truesdell*, 178 Penn. St. 429. 'Legal heirs' held to mean distributees under the Statute of Distributions. *Kendall v. Gleason*, 152 Mass. 457, 462. See also *Lawton v. Corlies*, 127 N. Y. 100, 'heirs at law' found to mean persons entitled under the two statutes of distribution and descent.

² *Darbison v. Beaumont*, 1 P. Wms. 229; s. c. 3 Bro. P. C. Toml. 60.

In another case a testator, having bequeathed life annuities to his three daughters, and an annuity to A, another daughter, during the joint lives of A and the testator's only son, B, gave his estate, subject to payment of the annuities, to A for two years, remainder to B for a long term, if he should live so long; and subject thereto he gave the estate to B's heirs male 'and to the heirs' of A jointly and equally, to hold to the heirs male of B and to the heirs of A and their heirs and assigns forever. For want of heirs male of B at the time of his death, the testator gave the estate, charged as aforesaid, to the heirs of the body of A forever. At the date of the will B had a son and two daughters, and A had a son. B died in A's lifetime. The question was whether the son of A was entitled under the words above quoted. It was held he was; he was not rightly called 'heir,' as the testator, by giving A a term and a subsequent annuity, took notice that she was alive, but this also showed the sense in which the word 'heir' was to be taken, to wit, as heir apparent.¹

Much within such cases are cases in which the testator merely misdescribes a devisee or legatee as his heir; as
 Misdescription where he says, 'I give Blackacre to my
 of heir. brother A, who is my heir,' when A was not his heir. The gift is good notwithstanding the misdescription, for the intention of the testator is perfectly plain.²

More frequently the construction has been that the context was such as to require the courts to say that by 'heirs' the testator meant children. A testatrix wrote: 'I give to my sister A's heirs £6000' and 'I give to my sister B's children, equally, £1000.' At the date of the will A had two children, one a married daughter, who

¹ Goodright v. White, 2 W. Bl. 1010.

² Jarman, 920.

afterwards died in the lifetime of the testatrix, leaving three children. A was still living, and the question was whether her surviving child was entitled to the legacy. It was held that he was; it was considered that the testatrix intended to give the £600 to the children of A, in view of the gift to the children of B.¹

A testator gave a life estate in lands to his daughter, and directed that after her death the proceeds of his real and personal estate should be applied for 'Heir': child. the benefit of her children during their minority, and that afterwards the personalty should be assigned to them. Then he directed his trustees to convey his freehold and leasehold lands to 'the heir or heirs who should be legally entitled to the same,' but in case his daughter left no children, all the property to go over. 'Heir' or 'heirs' was not to be taken in the technical sense, as the context in regard to children indicated, and children must have been meant.²

Next take the word 'issue.' This, too, is a technical term, and as such, *prima facie*, means heirs of the body, or lineal descendants of every degree — 'Issue,' one's posterity entire, not one's immediate offspring only.³ Thus in the case of a simple gift to A or his issue, if A should die in the testator's lifetime, and leave one son and children of a son deceased after the testator's death, the son and the grandchildren, not the son alone, would take.⁴

¹ *Loveday v. Hopkins*, Ambl. 273.

² *Milroy v. Milroy*, 14 Sim. 48. So in *Dawson v. Schaefer*, 52 N. J. Eq. 341, 345; *Griffen v. Ulen*, 139 Ind. 565; and many other cases.

³ *Robins v. Quinliven*, 79 Penn. St. 333; *King v. Savage*, 121 Mass. 303; *Jackson v. Jackson*, 153 Mass. 374, 377; *Chwatal v. Schreiner*, 148 N. Y. 683; *Drake v. Drake*, 134 N. Y. 220, 224; *Soper v. Brown*, 136 N. Y. 244; *Jarman*, 1257, 1258; *id.* 946.

⁴ *Jarman*, 946; *Davenport v. Hanbury*, 3 Ves. 257.

A testator gave a moiety of his personality and of the proceeds of his realty to be sold to A and his heirs, Grandchildren to be divided between B, C, D, and E; as issue. 'but in case of their decease, or of any of them, such deceased's share to be divided equally among the lawful *issue* of such deceased, and in default of such issue, such share to be equally divided among the survivors.' C, D, and E died in the testator's lifetime, leaving children and grandchildren. It was held that the grandchildren took with the children.¹

But the word is easily diverted from its primary signification; it has no great firmness or stability of meaning — not so much as 'heirs of the body.'² It has often and easily, for instance, been construed to mean children.³

A testator bequeathed a sum of money in stock to each of several persons, if living at his death, and if not, he directed that their lawful 'issue' 'Issue': child. should take the stock which their respective 'parents,' if living, would have taken. It was clear that 'issue' was here taken out of its technical sense; and 'their parents' showed that the testator meant children by the word.⁴

¹ *Freeman v. Parsley*, 3 Ves. 421. They take per capita in such cases.

² *Jarman*, 1258.

³ *McPherson v. Snowdon*, 19 Md. 197; *Hall v. Hall*, 140 Mass. 267; *King v. Savage*, 121 Mass. 303; *Ballentine v. De Camp*, 39 N. J. Eq. 87; *Parkhurst v. Harrower*, 142 Penn. St. 432; *Hill v. Hill*, 74 Penn. St. 173; *Edwards v. Bibb*, 43 Ala. 666.

⁴ *Sibley v. Perry*, 7 Ves. 522. See *Gerhard's Estate*, 160 Penn. St. 253. But *Sibley v. Perry*, on other facts in it — as to 'issue' in other distinct parts of the will, — has well been considered unsatisfactory. *Ralph v. Carrick*, 11 Ch. D. 873, 882, 884. *Jackson v. Jackson*, 153 Mass. 374, 375. See also *Ralston v. Truesdell*, 178 Penn. St. 429, 432,

A testator (let it be supposed) makes a bequest to the 'issue' of A, or in case the parents be dead, to the 'issue' of such 'issue.' Here, too, it is plain that 'issue' in the first instance is not to be taken in the technical sense; 'the parents' of the following clause are the same persons, hence children of A are meant. But there is nothing except this suggestion to show that 'issue' in the *second* instance is not to be taken in its technical sense; and it would seem that it must be so taken.

A testator bequeathed a share of money to his niece A for life, and after her death to her children living at her death and the issue then living of chil- Issue in technical sense.
dren then dead, each surviving child to take an equal share, 'and the issue, if more than one,' of deceased children 'to take equally amongst them the share which their parent would have been entitled to if he or she had survived A, and if but one, then to take the child's share.' The other shares of the money were then given in similar terms to other nieces and their respective children and issue; and in the event of all the said nieces dying 'without leaving a child or issue of a child living at their respective deaths, then' to the residuary legatee. It was held that the word 'issue' must be considered as retaining its technical sense.¹

The method of working out the result in that case was 'heirs of the body' followed by 'child or children.' These cases show that it does not follow from the fact that 'issue' is to be taken to mean children where the words 'parents' and 'issue' are found in immediate connection, it is to be taken as meaning children where 'issue' is not used in such connection with 'parents.' Here, then, we have a *rule* of construction, and that rule brings back the primary sense of the word. Post, chapter xxii.

'Issue' is a more flexible word than 'descendants.' *Ralph v. Carrick*, *supra*.

¹ *Ross v. Ross*, 20 Beav. 645.

this: Issue, if more than one, were to take their parent's share, yet if there was but one, that one took, not a parent's, but a *child's* share. The collocation of the word 'parent' with the word 'issue' was wanting in this branch of the case, so that up to this point it was uncertain in what sense the word 'issue' had been used.¹ Then came the gift over on general failure of issue, in which, per se, there was nothing to restrict the meaning of the word to children so as to put a construction on what was ambiguous in the previous part of the will. 'Suppose none but children were entitled under the original gift; then if you restricted the meaning in the same manner in the gift over, that gift would take effect and disappoint remoter issue, if any; or if you retained the wider meaning in the gift over, that gift would fail and there would be an intestacy. It is impossible to suppose the testator meant that.'²

The case therefore turned upon the language of the gift over, in which the word 'issue,' taken apart from the prior use of it, would clearly have its technical meaning. The result is a special rule of construction derived from the case in question, which has thus been stated: When there are ambiguous words in the original gift, you should not construe the gift over in a restrictive sense which it does not otherwise bear, but should construe the ambiguous words in the previous gift so as to agree with the unambiguous words contained in the gift over.³ And so, not infrequently, as we have elsewhere noticed, the working out a result without the aid of any known

¹ See *Jackson v. Jackson*, 153 Mass. 374.

² *Ross v. Ross*, 20 Beav. 645, as stated by Jarman, 950. The case is given at some length as serving so well to illustrate the method of the law in simple interpretation.

³ *Ralph v. Carrick*, 11 Ch. D. 873, Cotton, L. J., reversing 5 Ch. D. 984.

rule of construction at the time, results itself in a rule of construction. This is not very likely to be the case except with technical words or with words having a definite primary meaning; the rule speaks in terms of the use of some 'unambiguous' word. But the tendency is towards working out rules of construction wherever practicable, with a view to the attainment, more and more, of certainty on the 'average,'¹ in all common cases in which there is ground for doubt about the testator's meaning.

Consider now the word 'children.' This is not a technical word, as having any meaning in law which it has not in popular speech; but it has a definite primary meaning, to wit, legitimate off-spring in the first generation, including those *en ventre sa mère*.² Hence this is the meaning to be given to the word unless the context or other evidential influence indicates that it is not.³

An 'evidential' influence against the primary meaning would be found where the testator knows that the person to whose 'children' he makes a gift has no children, and knows that he has grandchildren. A testator gave his residuary estate to trustees upon trust to sell and divide the proceeds into

¹ Kekewich, J., in *In re Inman*, 1893, 3 Ch. 518, 520; ante, p. 155, note.

² *Starling v. Price*, 16 Ohio St. 29; *Hall v. Hancock*, 15 Pick. 255; *Laird's Appeal*, 85 Penn. St. 339; *Crook v. Hill*, 3 Ch. D. 773; s. c. L. R. 6 H. L. 265; *In re Burrows*, 1895, 2 Ch. 497, holding the same of 'issue,' and that too though the benefit is not for the unborn child.

³ *Pugh v. Pugh*, 105 Ind. 552; *Palmer v. Horn*, 84 N. Y. 516; *In re Schedel*, 73 Cal. 594; *Osgood v. Lovering*, 33 Maine, 464; *Thomson v. Ludington*, 104 Mass. 193; *Castner's Appeal*, 88 Penn. St. 478; *Low v. Harmony*, 72 N. Y. 408; *Willis v. Jenkins*, 30 Ga. 167; *Hopson v. Skipp*, 7 Bush, 644.

six shares, and pay one of the shares 'equally between all the children' of his late sister A, living at his death, and he gave the other five-sixths to the children of five other persons deceased. A, as the testator knew, had no children living at the date of the will, but had two grandchildren, who survived the testator. The grandchildren were held entitled to the gift to the 'children' of A.¹ 'Grandchildren' is a secondary meaning of 'children,' and, to save the gift, was therefore to be considered the testator's meaning.² The only doubt that could arise arose from the gift to the children of the other persons deceased, in which case there *were* children to take. But the gift to the whole set of children was to them, not in one mass, as where a specified fund was given to all,³ but was broken up into shares, one-sixth being given to the children of A, another sixth to the children of B, and so on, each class being described. This took the case out of an established rule of construction;⁴ but it also resulted itself in discovering a minor rule, limiting the operation of the other.⁵

¹ *In re Smith*, 35 Ch. D. 558.

² *Rhoton v. Blevin*, 99 Cal. 645.

³ *Radeliffe v. Buckley*, 10 Ves. 198.

⁴ 'If the testator on the face of the will,' said Kay, J., 'gives a legacy to the children of a deceased person, mentioning that person as being dead, and at the date of the will there are no children of that person, but there are grandchildren, then the court, on the principle *ut res magis valeat*, holds that the gift takes effect in favor of the grandchildren. On the other hand if the testator mentions the children of the late A B, the late C D, and the late E F, and some of these have left children, and one has left grandchildren only, then the court considers there is a difficulty in holding that the word "children," only once used, can have a different meaning where there are in one case children and in another case grandchildren. Again, if on the face of the will the testator shows an intention to use the word "children" in its normal and ordinary meaning, by himself having mentioned "grandchildren" as well as "children," there again the court feels itself obliged to read the word "children" in its ordinary sense.'

⁵ Under the claims of illegitimate children to take as 'children,'

Take for consideration, next, the word 'family.' This was formerly considered a word of uncertain meaning, unless aided by an explanatory context, and 'Family,' gifts to a man's 'family,' unexplained, have ^{formerly of} ^{uncertain} ^{meaning.} accordingly been held void for uncertainty. Thus a testator in the eighteenth century devised leaseholds to A 'forever, hoping he will continue them in the family.' It was held that no trust was created because of the indefiniteness of the object 'family.'¹ A testator early in this century gave property, personal and real, by residuary bequest to his wife for life, and after her death, one half to go to his wife's 'family,' the other half to his 'brother and sister's family.' The testator at the date of the will had a brother and a sister, each of whom had children; there were children of another deceased sister; and the testator's wife had a brother who had two children. Both gifts were held void for uncertainty.² Later a testatrix gave the residue of her effects to her daughters and their 'husbands and families.' The word 'families' was held to be of uncertain meaning, and, under other facts, the whole expression, 'husbands and families' was rejected.³

But just as we have seen a tendency to work out rules of construction from words having a definite primary meaning, especially where they are technical terms in the law, so we may now notice ^{'Family,' in} a tendency to find in words in common use, ^{relation to gifts} ^{of land.} such as the word 'family,' some primary signification

several important rules of construction have been developed about the word. These will be considered hereafter. Post, pp. 201-205.

¹ Harland v. Trigg, 1 Bro. C. C. 142. Of course this was fatal even if 'hoping' had been considered imperative, as it was not.

² Doe v. Joinville, 3 East, 172.

³ Robinson v. Waddelow, 8 Sim. 134. The daughters accordingly took the residue absolutely. But the decision was never quite satisfactory. 1 Sim. N. S. 246.

rather than cast the word aside for uncertainty. That is the last thing to be done. The tendency in regard to the word 'family' began to be seen first in cases in which the word was collocated with or related to *land*, in which cases the idea that it was of uncertain meaning was rejected; it was considered that it meant 'heir.' A testator gave real estate to his mother and her heirs forever, in the fullest confidence that she would devise the property to his 'family.' It was held that a good trust was created; that 'family' meant heir.¹

This, however, merely shows the tendency towards certainty. It is not true, and was not supposed to be true, that family meant 'heir' primarily except in cases of gifts of realty; that is, it was the context which made it mean heir. And as a matter of fact, this view of the word was only a halting ground, or step, to another

Further stage: and apparently general position. In several 'family,' cases the word came to be considered as meaning children. meaning 'children,' but generally with some aid, more or less, from the context,² until finally the step was taken of treating it as primarily meaning children, and therefore requiring evidence, such as a context, pointing another way to divert it from that meaning.³ More significantly still, it has now been declared that 'every word which has more than one meaning has a primary meaning.' Such meaning should then be dili-

¹ *Wright v. Atkins*, 17 Ves. 255. The court was now ready to cast doubt upon *Harland v. Trigg*, supra. As to the trust, the case would not now be followed. See ante, pp. 151, 152, note.

² See *Burt v. Hellyar*, L. R. 14 Eq. 160; *Barnes v. Patch*, 8 Ves. 604; *St. John v. Dana*, 66 Conn. 401, 405.

³ *Pigg v. Clarke*, 3 Ch. D. 672; *Wood v. Wood*, 3 Hare, 65; *Snow v. Teed*, L. R. 9 Eq. 622. But see *Wood v. Wood*, 63 Conn. 324, 327, which following the general dictionaries, makes the word, in the ordinary sense, include parents, children, and servants — the household.

gently sought, and must prevail until it is shown not to be the meaning intended by the testator.¹

Such, at all events, is the result of English authority. We may now consider cases in which the meaning of the word is thrown in doubt, so as to see how the law works out its conclusion. Context affecting word 'family.'

A testator bequeathed personalty to his wife, adding in a codicil addressed to her: 'Using your judgment when to dispose of it amongst your *children* when you can no longer enjoy it; but I should be unhappy if I thought any one of your *family* should be the better for what I feel confident you will so well direct the disposal of.' The testator having died shortly afterwards, leaving sons and daughters, one of the latter married, and his wife aged, and having no children except by her marriage with the testator, it was held that 'of your family' meant, not merely children, but 'of your blood,' that is, posterity.²

In another case a testatrix gave to her unmarried sister

¹ Jessel, M. R., speaking of the word 'family,' in *Pigg v. Clarke*, supra, says: 'In one sense it means the whole household, including servants and perhaps lodgers. In another it means everybody descended from a common stock, i. e., all blood relations; and it may perhaps include the husbands and wives of such persons. . . . In a third sense the word includes children only. Thus when a man speaks of his wife and family, he means his wife and children. Now every word which has more than one meaning has a primary meaning; and if it has a primary meaning you want a context to find another. What then is the primary meaning of family? It is "children"; that is clear upon the authorities which have been cited, and independently of them I should have come to the same conclusion.'

Further as to 'family' see *Townsend v. Townsend*, 156 Mass. 454, 456, and cases cited.

² *Williams v. Williams*, 1 Sim. N. S. 358. The court could not believe that the testator intended to create a trust as wide as that, and accordingly held that there was no trust. The wife, therefore, took as if this clause had not been introduced.

property for life, and, making her executrix, declared that she desired her sister to bequeath 'to those of her own family what she has in her own power to dispose of that was mine.' The words 'of her own family' were considered to mean kindred or relations; they did not mean children, as the sister was unmarried; they did not mean 'heir,' as the gift was of personalty.¹

In perfect accord with the method of construction under consideration, words may be supplied as well as ^{Supplying and} rejected, where it is clear beyond reason-_{rejecting words.} able doubt what the omitted words should be.² A testator devised to A and the heirs of his body, and if he should die, then to B. To the words 'if he should die' the court had no difficulty in adding 'without issue.'³ It is no objection to supplying words that men may differ in regard to the particular words which will the more fitly supply the omission.⁴ But they can be supplied only to carry out the intent of the testator as manifested in the will—not to create an intent,⁵ and not against a manifest intent to omit them.⁶

Again, consistently with simple interpretation, words, and even sentences, may be transposed, if necessary to ^{Transposing} remove uncertainty. Thus where it is clear _{words.} that language, otherwise senseless, or contradictory to other parts of the instrument, may be made

¹ *Cruwys v. Colman*, 9 Ves. 319.

² *Anlick v. Wallace*, 12 Bush, 531; *In re Miner*, 146 N. Y. 121, 131; *Starr v. Starr*, 132 N. Y. 154, 158; *Heald v. Heald*, 56 Md. 301; *Boston Safe Deposit Co. v. Coffin*, 152 Mass. 95, 98; *Greenough v. Cass*, 64 N. H. 326; *Patterson v. Read*, 42 N. J. Eq. 146; *Howerton v. Henderson*, 88 N. C. 597.

³ *Anonymous*, 1 And. 33.

⁴ *Anlick v. Wallace*, *supra*; *Nichols v. Boswell*, 103 Mo. 151.

⁵ *Hill v. Downes*, 125 Mass. 509, 512.

⁶ *Caldwell v. Willis*, 57 Miss. 555.

consistent with the context by transposition, the courts should make the needed change.¹ Accordingly the order or position of bequests or devises has sometimes been disregarded in order to prevent the failure of the will in such particulars.²

Finally, it is sometimes justifiable under simple interpretation to change the words of the instrument, in order to remove uncertainty. This may be done ^{Changing} when (1) it is plain that the testator has ^{words.} used the wrong word or phrase to express his intention otherwise shown by the will, provided, (2), it is plain what the right word or phrase is. The second part of the rule is as necessary as the first.³ Accordingly 'her' has been read 'their';⁴ 'heirs' has been read 'children,'⁵ — and 'issue,'⁶ and 'next of kin';⁷ 'children' conversely has been read 'issue,'⁸ and 'grandchildren';⁹ 'if he should die' has been read 'when he should die';¹⁰

¹ *Boston Safe Deposit Co. v. Coffin*, 152 Mass. 95, 98; *In re Miner*, 146 N. Y. 121, 131; *Woodruff v. Marsh*, 63 Conn. 125; *Davis v. Callahan*, 78 Maine, 313; *Patchen v. Patchen*, 121 N. Y. 164; *Merkel's Appeal*, 109 Penn. St. 235; *Hawes v. Foote*, 64 Texas, 21; *Graham v. Graham*, 43 W. Va. 36.

² *Davis v. Callahan*, *supra*.

³ *Taylor v. Richardson*, 2 Drew. 16. See also *Gray v. Pearson*, 7 H. L. Cas. 61; *Patchen v. Patchen*, 121 N. Y. 432; *In re Wells*, 113 N. Y. 379; *Hawes v. Foote*, 64 Texas, 22; *East v. Garrett*, 84 Va. 523; *Ellis v. Throckmorton*, 52 N. J. Eq. 792, 798.

⁴ *Horwitz v. Norris*, 60 Penn. St. 561.

⁵ *Bowers v. Porter*, 4 Pick. 198.

⁶ *Gifford v. Choate*, 100 Mass. 343, 345; *Dawson v. Schaefer*, 52 N. J. 1 Eq. 341, 345.

⁷ *Reen v. Wagner*, 51 N. J. Eq. 1.

⁸ *Castner's Appeal*, 88 Penn. St. 478; *Clifford v. Koe*, 5 App. Cas. 427.

⁹ *Osgood v. Lovering*, 33 Maine, 464.

¹⁰ *Smart v. Clark*, 3 Russ. 465.

'may leave' has been read 'may have';¹ 'leaving' children has been read 'having had' children;² the singular number has been read plural, and vice versa;³ 'or' has been read 'and', and 'and' has been read 'or';⁴ 'survivor' has been read 'other';⁵ these among a multitude of cases. But words are never to be changed if they are capable of an intelligible meaning;⁶ if intelligible they must be accepted, though the court may well suspect that the testator has not used the right language.⁷ His words, when plain, are the best evidence of his intention.

CLAUSES.

Thus far of interpreting particular words, by context or other language upon the face of the will. The examination of the authorities might now be pursued into the interpretation of clauses, in the same manner; but little, if anything, would be gained. It would be found that the method is

The same
method as in
interpreting
words.

¹ *Du Bois v. Ray*, 35 N. Y. 162.

² *Male v. Williams*, 48 N. J. Eq. 33, 39; *Du Bois v. Ray*, 35 N. Y. 162; *White v. Hight*, 12 Ch. D. 751.

³ *Low v. Low*, 77 Maine, 37; *Roe v. Vingut*, 117 N. Y. 204.

⁴ *Roe v. Vingut*, supra; *Shimer v. Shimer*, 50 N. J. Eq. 300; *Cody v. Bunn*, 46 N. J. Eq. 131; and many other cases. In most of the cases in which 'and' has been read 'or,' this has been done to favor the vesting of a legacy, not to defeat a prior vested gift. If the latter result would follow, the word should not be read 'or' unless there is the plainest necessity. See *Malcolm v. Malcolm*, 21 Beav. 225; *Day v. Day*, Kay, 703. Further see *Jarman*, 481, 490; *O'Rourke v. Beard*, 151 Mass. 9, 10; *Conway's Estate*, 181 Penn. St. 156; *Gilmor's Estate*, 154 Penn. St. 523; *Crews v. Hatcher*, 91 Va. 378.

⁵ *Ashhurst v. Potter*, 53 N. J. Eq. 608, 611; *Waite v. Littlewood*, L. R. 8 Ch. 70; *Smith v. Osborne*, 6 H. L. Cas. 375.

⁶ *Seibert v. Wise*, 70 Penn. St. 147; *Cody v. Bunn*, 46 N. J. Eq. 121.

⁷ *Taylor v. Meador*, 66 Ga. 230.

the same as in the case of particular words; harmonizing or clearing up apparently conflicting or doubtful language by calling in aid other language of the will and applying to the question good sense and sound judgment, with full determination to accomplish the purpose rather than fail — that is the method first and last, for all cases, in construction by interpretation.

CHAPTER XVI.

SECONDARY CONSTRUCTION: WORDS.

DIVISION OF RULES.

THE secondary method of construction, which we have now reached, seeks in most cases, as we have seen, to supply an ellipsis,¹ consisting in some imperfectly expressed intention of the testator; working out its result by means of rules framed for the purpose, upon the theory that it is better to save a gift by rational methods than to treat it as void merely because the testator has not fully expressed himself. These rules may be divided into two classes: the first consisting of rules relating to the meaning of particular words; the second, of rules relating to the meaning or existence of whole clauses. The division, however, must not be taken to be a hard and fast one; for the second one obviously must often turn upon the meaning of particular words. Still the division is substantial and important.

First, then, of rules of construction relating to the meaning of particular words.

The case for consideration is this: Doubt, by other language of the will, or by external facts, is thrown upon the primary meaning of the word or words in question, which doubt, not being removed by the language of the will, is to be removed, if at all, by some rule of construction.

The question
for considera-
tion.

¹ The only important exception is repugnancy, where there is a cutting off instead of supplying an ellipsis. See chapter.

For the purposes of the inquiry thus suggested, words may, in the first place, be considered as sociate or non-sociate.

SOCIATE WORDS: SUBJECT OF GIFT.

Let us consider, first, sociate words, or words in collocation, denoting some subject of gift in an enumeration of things, and assume that the primary Companion-meaning of them is drawn in question. How ship of words. is the doubt to be removed by rules of construction? The very fact of collocation — the companionship of the words — furnishes an answer. A rule of construction is applicable, if nothing stands in the way, which may be stated thus: —

A word is known by the company it keeps; ‘noscitur a sociis.’ That rule imports that the doubtful word is associated with other words of definite, or at least more definite, meaning, to which it is attracted by a sort of affinity such as to justify looking to those words in aid of the meaning of the doubtful one.¹ It is not enough that the accompanying words are more definite than the one in question; an indefinite word cannot be defined by a word which is only more definite, or rather less indefinite, especially if the latter is not used with intent to define the former. But if, added to the fact that the accompanying words have a definite meaning, they are of affinity with the doubtful one, the doubt may often be resolved; if nothing interferes, it may always be resolved. It is not necessary that all the accompanying words should be definite; enough that such as may be considered dominating are definite.²

¹ See *In re Lee*, 141 N. Y. 58, 63, 64; *Lippincott's Estate*, 173 Penn. St. 368; *Ennis v. Smith*, 14 How. 400.

² The principle, or something like it, may apply to sets of phrases of gift. Thus in a case of the kind in which annuities were given,

We may take, for illustration, a word towards which the attitude of the courts has undergone some change, Illustration in word 'estate': change of meaning. to wit, the word 'estate.' This word was formerly treated as in itself a word of uncertain meaning, but it appears now to have passed the stage of doubt; it is now certainly to be taken to have, primarily, a definite meaning, the meaning of property in a comprehensive sense, which makes it embrace realty. This takes it out of question, unless the primary meaning is by the context or elsewhere overturned and the real meaning put in doubt.

Take, then, such a common expression in wills as 'I give my estate and effects' to so-and-so, the testator having both land and goods, and assume Removing uncertainty of meaning of 'estate.' that question is made, as it might well be, by the collocation of words, whether the word 'estate' embraces land; can the uncertainty be removed by applying the rule concerning the companionship of words? The test will be worked out thus: 'Effects' ordinarily, that is, primarily, has the definite meaning of personalty; further, it has an affinity for 'estate,' as is shown by the fact that the words, if not strictly kindred, as they are not, are usually found together, as if by attraction — they are drawn to each other. The result, then, is that the rule may be applied, assuming of course that there is nothing else in the case to interfere.

But how is the rule to be applied to the case? It is

and the question was whether the annuitants were entitled to the corpus of property which was to produce the annuities, Lord Justice Smith said, by way of distinguishing another case: 'First of all, all the annuitants in this will are put in a bunch, and some of them are, clearly to demonstration, not intended by the testator to take more than an annuity for life.' In *re Morgan*, 1893, 3 Ch. 222, 232.

not to be taken as meaning that the doubtful word must have the same or nearly the same meaning as the accompanying words, though sometimes it comes to that. The rule only means that a method of interpretation is found applicable to the case. The word in doubt may by the rule be considered to have a contrary meaning quite as justly as a kindred meaning to the companion words; there is an affinity of contrast as well as of kindred in words.¹ Such is the case here. Obviously 'estate' here is not *ejusdem generis* with 'effects;' it does not mean personalty — that meaning would reduce it to silence;² hence, if the rule is to be applied, it must mean realty.

The rule *noscitur a sociis*, as we thus see, applies whether the words in company are to be taken as kindred or as contrasting. But how is one to know whether they are to be taken the one way or the other? The first of a couplet or other set of words is, from a natural tendency of thought, apt to be the most important one; it is seldom less important than the word or words following. A landowner thinks of his land before thinking of the goods upon his land; hence he speaks of his 'estate and effects.' On the other hand, if a man speaks simply of his 'effects and estate,' he emphasizes his effects, and 'estate' is presumably a secondary and subordinate idea; it is not land (according to the old authorities), but personalty, 'and estate' being a sort of general expression, or expletive, completing the idea expressed in 'effects.'

The case then appears to come to this: If the first of the words in company is the one in question, and the

¹ E. g., real and personal estate; lands and goods; vested and contingent estates; devise and legacy; testacy and intestacy; capital and income.

² Every word must have a meaning if possible. Ante, p. 178.

second clearly denotes personalty, the words are contrasting, and the first means realty. If the second of the words in company is the one in question, and the first plainly means personalty, the words are kindred and the second means personalty. We have for convenience spoken of words in couplets, but the case will be no different where three or four or more words are used together; the first one will generally be the key-note.

But all this assumes that there is nothing else in the case, that is, nothing to interfere with the application of the rule concerning accompanying words.

Effect of context. The context may put the rule in a new light, or put it aside entirely. In the example first given ('estate and effects') estate means land; there is nothing in the case to prevent the application of the rule. But if the testator has just been disposing of personalty alone, and then speaks of his 'estate and effects,' it may be and formerly was considered that the dominating thought in his mind still was of the personal estate of which he was possessed.

But in reality this is analogous to what has already been said. The first idea is thought to be the chief one; as that was an idea of personalty, what followed would not be apt to be of realty. While if his first idea had been of realty, the following gift of his 'estate and effects' might well be considered a gift of realty and personalty. If, however, the testator had already spoken of both realty and personalty, then ordinarily neither idea of property is dominant, and hence this prior thought could not have influenced him in using the word 'estate' in company with 'effects.' It might well have been otherwise if 'estate' had been alone; then, following 'realty and personalty,' it should by attraction of meaning be taken ejusdem generis, and hence mean land

and goods, if there were such property to which the word could be applied.¹ In the cases of this and the preceding paragraph the rule *noscitur a sociis* appears, then, in a new light.

We have now explained the meaning of the rule that a word is known by the company it keeps; the first word or thought is ordinarily the dominating one — its meaning is attracted as kindred to the doubtful word or thought following, where such dominating word or thought itself is not the doubtful one. If the first word *is* the doubtful one, its meaning is one of contrast to what follows, where otherwise it would be reduced to silence. These remarks must themselves now be brought to the test of the authorities. As before, the word 'estate' may be taken for consideration.

A testator devised all his 'estate, goods, and chattels'; the question was whether 'estate' carried realty. The answer, according to the foregoing remarks, ought to have been in the affirmative, assuming that there was nothing else in the will to affect the question. 'Estate' is the first, and therefore dominating word, and is the doubtful one. To make it mean personalty would be to reduce it (from its dominating place) to silence; it should therefore mean realty. The court held that the word would not pass lands where there had been no mention of land before; contra where land had been given in some previous part of the will.² But the case is opposed even to early authority, as will now be seen.

A testator devised lands, including a forfeited mort-

¹ Compare with these remarks cases of gift to residuary legatees, without defining the estate. Post, p. 320.

² *Cliffe v. Gibbons*, 2 Ld. Raym. 1326.

gage in fee, to various persons, and gave legacies to others; then he gave all the rest of his 'goods, chattels, leases, *estates*, *mortgages*, debts, ready money, plate, and other goods' to his wife. The question was whether 'estates' and 'mortgages' passed fee-simple lands. Without deciding the point, the judges were of opinion that they did not have that effect, but passed only estates and mortgages for years, of which kind of property also the testator was owner.¹

This is plainly within one of the remarks above made ('If, however, the testator had already spoken of both realty and personalty,' &c.). Having just spoken both of realty and personalty, neither idea influenced the words 'estates' and 'mortgages' in their association with 'goods, chattels,' &c., and hence neither has anything to do with the question. Then we have nothing but a plain case for the application of the rule; the words 'goods' and 'chattels' are the first words used; they are therefore dominating, and being certain they carry over by attraction their meaning to the words in question.

A testator having given by his will both realty and personalty, concluded thus: 'I order the lease of my house, with all the furniture . . . to be sold, and all the rest and residue to be divided among' certain persons named, share and share alike. The testator having by the will devised his interest in certain houses for the life of the devisee, it was now made a question whether the reversion in the houses had not passed under the words 'all the rest and residue.' But the court held that the reversion did not pass; nothing but personalty was intended.² The case falls within the same remark, that if the testator has already disposed of both realty and

¹ *Wilkinson v. Merryland*, Cro. Car. 447, 449; Sir W. Jones, 380.

² *Bibb v. Penoyre*, 11 East, 160.

personalty, neither idea of property is dominant, and such previous part of the case may accordingly be left out of the question. Then the rule remains to be applied *simpliciter*; personalty is the dominating thought; personalty alone is meant by the words in question.

A testator bequeathed legacies only, and then said: 'All the rest and residue of my *estate* and chattels . . . I give to my wife.' It was held that the word 'estate' did not pass land; 'for in the first part of the will the testator having given only legacies, and not lands, by the residue of his "estate" must be intended estate of the same nature as that before' given.¹ The preceding gifts were gifts of personalty, and of that only; hence personalty was the dominating thought, and being certain was attracted to 'estate.'² In another case, a testator gave to his sister all his 'stock in trade, household goods, wearing apparel, ready money, securities for money, and every other thing, my property, of whatever nature or kind soever.' It was held that land did not pass.³ The key-note was struck in the first words, which were certain; 'every other thing, my property' accordingly, meant personalty, by attraction of meaning.⁴

¹ *Marchant v. Twisden*, Gilb. Eq. Cas. 30; Jarman, 671.

² Words, however, have been left out which might well have caused a contrary decision. In reality it was not a case for the rule of *noscitur a sociis*.

³ *Doe v. Ront*, 7 Taunt. 79. 'It deserves notice that in the three last cases [*Cliffe v. Gibbons*, *Marchant v. Twisden*, and *Doe v. Ront*], in which the words "estate" and "property" were confined to personal estate, in consequence of the *society* in which they were found, there was no preceding devise or mention of real estate; a circumstance which, though not conclusive, was in each instance adverted to, and has generally been considered as having weight in the exclusion of real estate, by demonstrating that the testator had not property of that species in his contemplation when he made his will.' Jarman, 672.

⁴ But see *infra*, p. 189.

But as has already been intimated, the context may entirely put aside the rule *noscitur a sociis*. Thus while

Context putting aside the rule altogether.

the word 'estate' followed by 'and effects,' with nothing else relating to the case, means realty, it may be followed by words of definition, explanation, or restriction. The rule of accompanying words is plainly excluded in such a case, so far as the word defined is concerned. Thus a testator devised 'all those my freehold lands . . . now in the occupation of A, and all other the rest and residue and remainder of my *estate, consisting* in ready money, plate, jewels, leases, judgments, mortgages, or in anything whatsoever or wheresoever. It was held that the word 'estate' did not carry land.¹ In another case the testator said: 'I give all the remainder of my property whatever and wheresoever' to A, B, and C, 'to be equally divided between them . . . all my goods, stock, bills, bonds, book-debts, and securities in the Witham Drainage, in L., and funded property.' It was held that realty did not pass.²

Again, an adverse thought may be so plainly expressed that it cannot be overlooked, — a thought, that is to say, inconsistent with the idea that 'estate' is to be taken in the sense of the words accompanying it. Thus if a testator were to say, 'I give all my goods and effects, and, *furthermore*, all my estate whatsoever,' it would be difficult, even under the old authorities, to say that realty, if the testator had any, was not in his mind. The courts must give a meaning to every word, if possible.

The same result may come about by the existence of some expression or provision well removed from the word

¹ *Timewell v. Perkins*, 2 Atk. 102. The case goes further than is necessary to illustrate the point in the text, if it does not go too far, in view of the words of the last clause, 'or in anything whatsoever or wheresoever.' See *infra*.

² *Roe v. Yeud*, 2 Bos. & P. N. R. 214.

'estate'; accompanying words of personalty thus losing the effect which otherwise they might have. Thus after declaring his purpose to dispose of all his property, and after several devises, a testator gave 'all the rest and residue of my money, goods, chattels, *and estate whatsoever.*' It was held that land passed.¹ This was put upon the ground that by the words 'goods' and 'chattels' the testator had comprehended all his personalty, so that the words 'and estate whatsoever,' to have any meaning at all, must mean his realty.² But in view of the other authorities above stated, this was doubtful doctrine; if there were nothing but the residuary clause, it would seem that the rule of *noscitur a sociis* would apply, and the dominating thought being of personalty, personalty would be meant by the doubtful word. It would seem that a better ground in former times for the ruling would be that the testator had previously in the will expressed his intention to dispose of all his property, and had actually made several devises.

Perhaps, too, in cases like the one just stated, the words 'whatsoever,' 'wheresoever,' and the like, in such expressions as 'estate whatsoever,' 'and all estate of what nature or kind soever,' 'and all property whatsoever and wheresoever,' 'and all other estate,' deserved more attention than they sometimes received. So it would probably be thought now. Such words are very comprehensive, if taken in their natural sense, and they might well exclude the rule of *noscitur a sociis*.³ But the subject need not be further pursued.

¹ *Tilley v. Simpson*, 2 T. R. 659, note, Lord Hardwicke.

² To the same effect, *Jongsma v. Jongsma*, 1 Cox, 362; *Timewell v. Perkins*, 2 Atk. 102, *supra*; *Doe v. Evans*, 9 Ad. & E. 720.

³ See *Edwards v. Barnes*, 2 Bing. N. C. 252; *Doe v. Lainchbury*, 11 East, 290; *Campbell v. Prescott*, 15 Ves. 503; *Tanner v. Morse*, 3 P. Wms. 295; *Flemming v. Barrows*, 1 Russ. 276; *Fisher v. Hépburn*,

As has already been stated, the modern authorities are considered to have set the current in favor of the rule that lands will pass under words naturally capable of comprehending them, notwithstanding their association with terms applicable to personalty only.¹ The word 'estate' or 'property' thus is presumptively taken out of the rule *noscitur a sociis*, on the question whether it means realty or personalty in association with words meaning personalty; presumptively it still embraces realty. In other respects the rule may still be applicable to it.

The definition which makes the word embrace realty *may*, indeed, be overcome by the special or peculiar collocation of words; but the effect of the more modern authorities is that the evidence of intention from the accompanying words must be clear — much clearer than under the older authorities. The term has in recent times steadily been gaining firmness of meaning.² Mere association of words is not enough to affect the case.

Definition of
'estate' as
embracing
realty, how
overcome.

14 Beav. 627; *Smyth v. Smyth*, 8 Ch. D. 561; *Hall v. Hall*, 1892, 2 Ch. 361, s. c. 1891, 3 Ch. 389, on the word 'effects,' 'wheresoever situated,' in a 'devise,' passing land.

¹ *Jarman*, 682, citing *Midland Ry. Co. v. Oswin*, 1 Colly. 74; *O'Toole v. Browne*, 3 El. & B. 572; *Paterson v. Huddart*, 17 Beav. 210; *In re Greenwich Hospital*, 20 Beav. 458; and other cases. 'The old rule is in fact reversed; for it is now settled that words such as 'property' and 'estate,' capable of including real with personal estate, will not be deprived of their full force without evidence that they were intended to be used in a more confined sense, whereas formerly the burden of proof was on the other side.' *Id.*

² The following American cases may be consulted with profit: *Jackson v. Housel*, 17 Johns. 281; *Hurdle v. Outlaw*, 2 Jones, Eq. 75; *Hunt v. Hunt*, 4 Gray, 190, 193; *Howland v. Howland*, 100 Mass. 222; *Laing v. Barbour*, 119 Mass. 523, 525; *Smith v. Smith*, 17 Gratt. 276; *Korn v. Cutler*, 26 Conn. 4.

On the collocation of the word 'estate' or 'property' with executorship, see *Jarman*, 683-686; *In re Cameron*, 26 Ch. D. 19.

NON-SOCIATE WORDS: OBJECT OF GIFT.

Having considered sociate words of doubtful meaning, it remains to consider non-sociate words. Sociate words were found to be words relating to the ^{What are non-} subject of gift, i. e., some kind of property; ^{sociate words.} non-sociate words, of a corresponding kind, relate to the object of the gift, i. e., the devisee or legatee or some one described as in some relation to him.¹ Has the law furnished any means of resolving doubt in the meaning to be given to such non-sociate words? To some extent it has; as before, in the way of rules of construction.

There are, first, certain words to which the law has assigned a technical meaning, that is, a meaning different from the popular meaning; and there ^{Technical} are other words which, having various mean- ^{words.} ings, have one which is primary.² Such words are to be taken presumptively in their technical or primary sense.³ Thus 'heir' in a gift to an 'heir'⁴ means, *prima facie*, the person upon whom real estate would devolve in case of intestacy.⁵ But this meaning may be thrown into doubt

¹ Devisees or legatees may be associated, that is, may take together; but between one devisee or legatee and another, the words of designation must ordinarily be dissociate. Objects are sometimes associated, as uncles and aunts, nephews and nieces; but the association can seldom help the meaning.

² Technical words seldom appear in an enumeration of the *subjects* of a gift; if they should, the text would apply to them.

³ *Quarm v. Quarm*, 1891, 1 Q. B. 184, 186, 187.

⁴ But presumptively, of course, 'heirs' is a word of limitation, not of purchase. *McCrea's Estate*, 180 Penn. St. 81; *In re Allen*, 151 N. Y. 243, 248; *Bryson v. Holbrook*, 159 Mass. 280; *Johnson v. Whiton*, id. 424. And this is true of personalty as well as of realty. *Wood v. Seaver*, 158 Mass. 411.

⁵ *Lawrence v. Crane*, 158 Mass. 392, 393. See *Olney v. Lovering*, 167 Mass. 446, 448; *Fabens v. Fabens*, 141 Mass. 395.

by the context or by external facts; occasion then arises for special aid from construction.¹

Three rules may be noticed, the application of one or other of which will be of service.² First, an intention directly expressed, or to be gathered from the language used, will prevail over any technical meaning attached to the word, unless that intention is opposed to some absolute rule of law.³ Secondly, where an intention appears to make a gift such as the law permits, and a technical term is used the intended meaning of which is not explained by any language of the will, the technical meaning will be applied, whether the result be to annul the gift or to enlarge or cut down the word as distinguished from giving it some secondary meaning.⁴ Thirdly, as a corollary to these two rules, it appears to be generally true that when a word is used in a similar connection more than once, it is to receive the same construction in each case;⁵ with this exception: A word having a technical meaning in law, which it loses by reason of the context of the clause containing it, if used again in another distinct clause, in reference to a different

¹ In re Moore, 152 N. Y. 602; *Montignani v. Blade*, 145 N. Y. 111, 122; *Dawson v. Schaefer*, 52 N. J. Eq. 341, 345; *McCrea's Estate*, 180 Penn. St. 81.

² From a note by the present writer, in *Jarman*, 905.

³ *Sears v. Russell*, 8 Gray, 86, 94; *Knowlton v. Sanderson*, 141 Mass. 323; *Morton v. Barrett*, 22 Maine, 257; *Bennett v. Evans*, 26 Ohio St. 409; *Smith v. Schultz*, 68 N. Y. 41.

⁴ *Sears v. Russell*, *supra*; *Rand v. Sanger*, 115 Mass. 124; *Rand v. Butler*, 48 Conn. 293; *Thurber v. Chambers*, 66 N. Y. 42; *Lawton v. Corlies*, 127 N. Y. 100; *Richardson v. Martin*, 55 N. H. 45; *Reinders v. Koppelman*, 68 Mo. 482; *Quarm v. Quarm*, 1891, 1 Q. B. 184, 186, 187.

⁵ See *Turner v. Balfour*, 62 Conn. 89; *Wood v. Wood*, 63 Conn. 324.

subject, without such explanatory context, must receive in the latter clause its technical meaning.¹

But it does not always clear the way of difficulty to state the rules which govern a case; the question often remains how the rules are to be applied to the particular question, or which of the rules is applicable to it. When, for instance, — to return to the first of the rules above stated, — has the testator, by the context attached to the technical word a meaning at variance with its technical meaning? No rule can be laid down for all cases. One or two rules have been established with regard to the word 'heirs.' When that word, as used by the testator, is used with evident reference to a set of children elsewhere mentioned as a whole, or elsewhere described individually, the word is to be treated as used merely for convenience, or to avoid repetition, and is to be understood in the sense of that for which, accordingly, it stands.²

The second rule, which results in annulling or cutting down or modifying a gift, by reason of the failure of the testator to provide some legal means for interpreting the technical word in a secondary sense, is illustrated by the case of a gift to the 'heirs' of a living person, but not indicated by the will to be living. Now there can be no heir of a living person, and for this technical reason the gift fails.³ But this defeats a perfectly legitimate intention; and hence when any indication, however slight, can be found in the will that the testator

¹ *Lloyd v. Rambo*, 35 Ala. 709; *State Bank v. Ewing*, 17 Ind. 68; *Ralph v. Carrick*, 11 Ch. D. 873, 882-884 (doubting *Sibley v. Perry*, 7 Ves. 522); *Jackson v. Jackson*, 153 Mass. 374, 375 (same doubt); *Carter v. Bentall*, 2 Beav. 522; *Doe v. Ewart*, 7 Ad. & E. 636.

² *Ex parte Artz*, 9 Md. 65.

³ *Heard v. Horton*, 1 Denio, 168; *Campbell v. Rawdon*, 18 N. Y. 412, 417; *Simms v. Garrot*, 1 Dev. & B. Eq. 393.

contemplated a gift to the persons called heirs, in the lifetime of their ancestor, the courts will lay hold of it and save the gift.¹ Thus a testator gave property to the 'heir' of A, described as 'of Butterhill,' and the description was taken as showing that the testator contemplated in A a person living at his death.² There is of course an end of question if the testator directly states that the person is living.³ But in the absence of expressed intention, the rule that a gift to the 'heirs' of a person stated or indicated to be living, is meant to be a gift to the children or other kindred of the living person rather than to those who may be his heirs at his death, applies only when those heirs are to take presently upon the testator's death. It would not apply where the gift to them follows a gift to some one else.⁴

Take for consideration the common word 'issue.' That is a technical term, which in its primary or technical sense means one's entire posterity, heirs of the body through all generations. 'The term embraces descendants of every degree, whensoever

¹ *Montignani v. Blade*, 145 N. Y. 111, 122.

² *Carne v. Roche*, 7 Bing. 226.

³ *Heard v. Horton*, 1 Denio, 168; *Montignani v. Blade*, supra. 'It is true,' said Finch, J., in the last-named case, at p. 122, of a gift of personalty, 'that the testator, in providing for the ultimate vesting, gave the stock to the "heirs" of his son John, and since John is living and strictly can have no heirs until his death, it is argued that the vesting is postponed for the further life of John. But where the bequest is of personal property, the word "heirs" is taken to mean those in the line of distribution, or the next of kin; and where the will shows on its face that the person whose heirs are referred to is, to the knowledge of the testator, at that time living, it is obvious that it is not used in its strict technical sense, but means, in the case of land, heirs apparent, or those who would be the heirs were the living ancestor deceased (*Heard v. Horton*, 1 Denio, 168), and, in the case of personal property, next of kin, who would be such were the ancestor deceased (*Cushman v. Horton*, 59 N. Y. 151).'

⁴ *Campbell v. Rawdon*, 18 N. Y. 412.

existent, and, unless restricted by the context, cannot be satisfied by being applied to descendants at a given period.'¹ Prima facie meaning heirs of the body, it is therefore a word of limitation, that is, a word describing and limiting the estate of the ancestor, giving him an estate tail, and not a word of purchase for the 'issue'; unless a different intention is shown. Hence a devise to A for life and after his death to his 'issue' creates, in the absence of statute, an estate tail in A, and not a life estate with a remainder by way of purchase in the issue.

The question then is, whether there are any rules of construction by means of which this primary meaning can be overturned and an estate given to the issue as

¹ Jarman, 1257; *Jackson v. Jackson*, 153 Mass. 374, 377; *Patterson v. Madden*, 54 N. J. Eq. 714, 717, 723. See the last case as to the common-law construction of the words 'leaving no issue' or 'without leaving issue,' or 'dying without issue' in devises and bequests, followed by gifts over; also *Coles v. Ayres*, 156 Penn. St. 197; ante, p. , note. The effect of such words has been the subject of legislation in many States. At p. 723 of *Patterson v. Madden*, supra, Gummere, J., says: 'By the decision in *Pennington v. Van Houten*, 4 Halst. Ch. 745, . . . two rules are established in the construction of wills containing a limitation over by way of executory devise after the death of the original devisee without issue, viz.: *First*, If land be devised to A in fee, and a subsequent clause in the will limits such land over to designated persons in case A dies without issue, and A so dies, and the substituted devisees are in esse at his death, and there is no other event expressed in the will to which the limitation over can fairly be referred, then A takes a vested fee which becomes divested at his death, and vests in those to whom the estate is limited over. *Second*, Where there is an event indicated in the will other than the death of the devisee, to which the limitation over is referable . . . such limitation over will be construed to refer to the happening of such event, or to the death of the devisee, according as the court may determine, from the context of the will and the other provisions thereof, that the limitation clause is set in opposition to the event specified, or is connected with the devise itself.'

purchasers; for if the issue take as purchasers, the ancestor cannot cut them off by any process of turning his estate tail into a fee simple — he has no estate tail if the issue are purchasers. Reminding the reader that the subject under consideration is not the devolution of property, but merely legal method in reaching results — in the case in hand, the method of overturning the particular presumption — the answer is, that there are rules of construction affecting the primary meaning of the word, some against it, some in favor of it. The following may be noticed: —

The primary meaning of the term ‘issue’ has been departed from by a testator when he has provided that the ‘issue’ shall take in equal shares, or as tenants in common, with a limitation to the heirs general of such issue. A testator devised to A for life, and after his death unto all and every the issue of the body of the said A, share and share alike, as tenants in common, and the heirs of such issue. It was held that A took an estate for life only, and that the issue took a remainder, that is, they took by purchase.¹ In another case a testator devised to A for life, and after his death to the use of all and every the lawful issue of the said A, their heirs and assigns forever, as tenants in common, on attaining twenty-one years of age. The same result was held to follow.²

The rule of construction on which these cases are founded proceeds upon the ground that the mode of enjoyment prescribed for the issue is inconsistent with the legal idea of an estate tail. If that were so plain as to be beyond question, there

¹ Greenough v. Rothwell, 5 Man. & G. 628.

² Slater v. Dangerfield, 15 Mees. & W. 263.

would be no place for any 'rule' of construction at all in the matter; the simplest kind of interpretation would be all that could be required or admitted. But the case is not so clear, — it is only a case of probability,¹ — and hence the rule is a true rule of construction. The rule is considered to be strengthened by the addition of a gift over on default of issue, or of issue of a particular designation, as in default of issue dying under twenty-one.²

The primary meaning of 'issue' is changed again, as we have elsewhere seen,³ where the testator makes a gift to a person, and then, upon his death, or by way of substitution if the parent should not take, makes a gift to the 'issue' of that person, giving to such issue only the parent's share. In such a case the meaning of the word 'issue' is cut down to children.⁴ It seems, however, that this would not be the case where 'issue' and 'parents,' the contrasting objects, are not used in immediate connection, especially if there be other indication in the will of the use of 'issue' in its broad, primary sense.⁵ A testator bequeathed a sum of money to trustees in trust to pay the income to his son's wife for life, and the principal on her death to her husband 'if then living, and if not, to her issue. And if she should survive her

'Issue' meaning children: primary sense, where 'parents' and 'issue' are separate.

¹ See the remarks of Jarman, 1260 et seq.

² *Doe v. Burnsall*, 6 T. R. 30; 3 R. R. 113. ³ Ante, p. 194.

⁴ *Ralph v. Carrick*, 11 Ch. D. 873; *Jackson v. Jackson*, 153 Mass. 374, 377. Both of these cases, however, doubt *Sibley v. Perry*, 7 Ves. 522, and the Massachusetts case, as before in *Hills v. Barnard*, 152 Mass. 67, refused to follow *Martin v. Holgate*, L. R. 1 H. L. 175. See also *Ralston v. Truesdell*, 178 Penn. St. 429; and see *Crane v. Bolles*, 49 N. J. Eq. 373, 382, on the question whether the issue must survive the period of distribution where the gift is substitutional.

⁵ *Jackson v. Jackson*, supra.

said husband,' the will proceeded to declare, 'and should leave no issue, I give' the said sum 'at her death to all my children then living, and the issue of any deceased child; such issue to take as by right of representation the shares of their respective parents.' The son's wife survived her husband and left two sons and a daughter, also the only child of a deceased daughter, and the children of one of the two sons; she had no other issue living after the testator's death. It was considered that the primary sense of the word 'issue' had not been taken away by the language of the will, and hence that it should be construed to mean all lineal descendants; the result of which was, that the two sons and the daughter, and the child of her deceased daughter, took the principal in equal shares.¹

Again, 'issue' may mean children of a person living in the lifetime of the testator; as where there is a gift to A, and to A in fee, but, in case of his death without issue, to B. The rule is thus laid down: Where real estate is given in terms denoting an intention that the primary devisee shall take a fee or absolute estate in personalty on the death of the testator, followed by a gift over in case of his death without issue, the words refer, by the uniform rule in England, and by the weight of authority in this country, to death without issue in the lifetime of the testator; and the primary devisee or legatee surviving the testator takes an absolute estate.² But it is said that this rule 'maintains its hold somewhat weakly and with a doubt-

¹ *Jackson v. Jackson*, 153 Mass. 374.

² *Vanderzee v. Slingerland*, 103 N. Y. 55, *Andrews, J.*; *Stokes v. Weston*, 142 N. Y. 433, 436; *Washbon v. Cope*, 144 N. Y. 287, 297; *In re Denton*, 137 N. Y. 428; *Benson v. Corbin*, 145 N. Y. 351, 358, *Finch, J.*; *Antioch College v. Branson*, 145 Ind. 312; *Fowler v. Duhme*, 143 Ind. 248, 260.

ful grasp,' yielding easily to indications of a different intention.¹ It does not apply where a life or other estate intervenes between the gift to A and that to B,² or where A himself takes only a life estate, or anything less than an absolute estate, whether in realty or personalty.³

On the other hand, there are rules, as has already been intimated, in support of the presumptive meaning of the word 'issue.' One of them is, that the word is not converted into a word of purchase by the addition of words of limitation describing heirs of the same kind as the issue. A testator devised to his nephew for life, and after his death to the use of the male issue of his body, and the heirs male of such issue male, and for want of such male issue, then over. It was held that the nephew took an estate tail.⁴ It was a case of balancing intentions, and so the presumption prevailed.

Another rule is that the addition of a limitation to the heirs *general* of the issue will not prevent the word 'issue' from creating an estate tail, as a word of limitation, according to English authority.⁵ A testator devised to A for life, and after that estate to the issue male of A and to their heirs, and for want of such issue, over. A was held to take an estate tail.⁶ Still another rule in favor of the primary sense: If there be a gift over, upon a general failure of 'issue,' 'issue' must be taken in its

¹ Finch, J., in *Benson v. Corbin*, *supra*. See also *In re Denton*, 137 N. Y. 428, 433.

² *In re Denton*, *ut supra*.

³ *Mullarky v. Sullivan*, 136 N. Y. 227, 231; *Fowler v. Ingersoll*, 127 N. Y. 472.

⁴ *Roe v. Grew*, Wilm. 272; 2 Wils. 322.

⁵ But see *Shreve v. Shreve*, 43 Md. 382; *Way v. Gest*, 14 Serg. & R. 40.

⁶ *King v. Burchell*, 1 Eden, 424.

technical sense, unless some different intention is manifested in the will.¹

As for non-technical words, the ordinary popular meaning is the primary one, and, unless a different intention is shown, they are to receive that meaning, if it is definite enough to solve the question raised. If, however, the popular meaning is vague or doubtful, the courts will find perhaps a sufficient one; or if, though such meaning is definite enough, that meaning is thrown into doubt, there may arise occasion for construction. But in many cases it will be found that there are no rules of construction for such cases. In such cases the doubt must be resolved, if at all, by such sensible means as are still left. Comparison and experiment should be tried; one should endeavor to put oneself in the position of the testator; the particular word or phrase should be thrown into this light and that, and its consistency with the rest of the will tested accordingly, until some just meaning can, if possible, be found for it.

There are cases of isolated words of object,² however, having no technical meaning, in regard to which rules of construction have been found as desirable and practicable as in the cases of technical words, in aid of the meaning when doubt is raised by other language of the will or from without. The word 'children' furnishes an instance.

Primarily the word children means offspring in wedlock, in the first generation. Illegitimate children are

¹ *Ross v. Ross*, 20 Beav. 645 (ante, p. 170); *Ralph v. Carrick*, 11 Ch. D. 873.

² That is, words not in collection — non-sociate words, so as not to be within the rule of *noscitur a sociis*.

excluded by a strong presumption, or, perhaps more correctly, by great firmness of the primary meaning of the word. How firm that meaning is may be seen in this, that it is not affected by the fact alone that there are no other than illegitimate children at the time when the gift is to take effect, so that the gift must fail for want of objects. A testator bequeathed certain annuities and desired that the first one that fell in should devolve upon the 'eldest child, male or female, for life, of A.' At the time of making the will A had, to the testator's knowledge, illegitimate and no legitimate children, and had none when the first annuitant died. It was held that by the words 'eldest child' those only could be considered intended who could entitle themselves as children by the strict rule of law; no illegitimate child had any claim.¹

Indeed it was formerly laid down that nothing short of necessary implication could enable illegitimate children to take under the designation 'children.'² A testator, unmarried, directed that in case he should have any child or children by A, a woman with whom he was cohabiting, a certain sum of money should be raised 'for such child or children.' It was held that this must be looked upon as a case in which the testator contemplated marriage with A, and therefore legitimate children only were meant; there was not enough, it was said, to show any necessary implication that illegitimate children were meant.

Necessary implication formerly required to overturn the definition: not so now.

¹ *Godfrey v. Davis*, 6 Ves. 43; *Holt v. Sindray*, L. R. 7 Eq. 170, 175; *Gardner v. Heyer*, 2 Paige, 11; *Lyon v. Lyon*, 88 Maine, 395, 406.

² Lord Eldon in *Kenebel v. Serafton*, 2 East, 530. To the same effect, *Wilkinson v. Adams*, 1 Ves. & B. 422; *Mortimer v. West*, 3 Russ. 370.

But while the decision against illegitimates in such a case would still be upheld, the doctrine that necessary implication is required to admit illegitimates under the designation of 'children' appears to have been abandoned. Any reasonable evidence that the testator meant illegitimate children would now be considered. Of course where he identifies the child or children by name, as, for instance, 'my son William,' having no legitimate offspring of the name, the case is clear beyond doubt.¹ So where he identifies them as 'now living,' the only children living at the time being illegitimate.² The same would be true of a gift to a person till marriage for the support of her children A and B, 'and in case of her death or marriage . . . to the use of her children';³ and also of a gift to 'the children of the late A,' a person dead when the will was made, leaving illegitimate children only.⁴

Such cases are too plain for doubt; they fall within the meaning of necessary implication. But it now appears to be clear, against former doubts, that illegitimate offspring may take *with* legitimate, when the context or other language of the will reasonably indicates that such was the testator's intention.⁵ The rule has been stated thus: In order to let in illegitimate children in a gift to 'children,' it must be clear on the terms of the will, applied to the facts at the time of making it, that legitimate children never could have taken; or that its terms,

¹ Rivers's Case, 1 Atk. 410.

² Gardner v. Heyer, 2 Paige, 11; Beachcroft v. Beachcroft, 1 Madd. 430; Gabb v. Prendergast, 1 Kay & J. 439.

³ In re Connor, 2 Jones & L. 456.

⁴ Woodhouselee v. Dalrymple, 2 Mer. 419.

⁵ Hill v. Crook, L. R. 6 H. L. 283, Lord Cairns; In re Haseldine, 31 Ch. D. 511; Barnett v. Tugwell, 31 Beav. 232; In re Harrison, 1894, 1 Ch. 561, 567.

so applied, never could have had full effect if confined to legitimate children.¹ Indeed it is declared that the doctrine that, in the absence of express language, there must be necessary implication to show that 'children' will include illegitimate offspring, is to be taken only as warning or caution not to give way to guesses or speculation, and not as a canon of construction.²

It is not to be supposed, however, that the firmness of the primary meaning of 'children' has given way; the foregoing remarks only show that too high Firmness of meaning of 'children' still maintained. ground was formerly taken in regard to the word. It would probably be held now as formerly, for instance, that, even though in a codicil the testator recognize as his own an illegitimate child born since the execution of the will, there is not sufficient to entitle the child to claim a gift in the will to the future children of the testator.³ Perhaps it would not be enough that even in the same will the testator has made a gift to such child by the description of the only surviving child. A testator gave the residue of his property equally between the children of his son A and of his two other children. In the same will he made a specific bequest to B as 'the only surviving child of A.' Only legitimate children were considered entitled.⁴

In all these cases it has been said, by way of comment, that the terms of the gift were satisfied by referring them to legitimate children only. In none of the wills was there any such manifestation of intent to use the word 'children' out of its ordinary legal sense of legitimate

¹ Jarman, 1097.

² In re Jodrell, 44 Ch. D. 590, Bowen, L. J.; In re Deakin, 1894. 3 Ch. 565, 571.

³ Arnold v. Preston, 18 Ves. 288.

⁴ Bagley v. Mollard, 1 Ryan & M. 581.

offspring as to justify giving to it any other meaning. They show that the circumstance that the testator was a bachelor and had illegitimate children when he made the will, and that some of such children were objects of his bounty, and were described as the 'children' of the person to whose other children the gift in question is made, — that all this is not enough to divert the word 'children' from its primary meaning. In such cases the *conjecture*, though highly reasonable, that the testator meant by the gift to discharge a moral duty to his illegitimate offspring is dismissed before the rule that 'children' must still mean legitimate children only.¹ Such at any rate is the doctrine of the English authorities.²

It is laid down that the rule which prevents illegitimate children taking under a gift to 'children' does not apply to a gift over to another on default of issue of an illegitimate child. A testator made two devises in favor of his illegitimate daughter A, describing her in each as his 'eldest daughter.' Then he made a gift to his 'four youngest daughters' by name, and after other dispositions directed 'that should any of my children die without having children lawfully begotten, their share, whether land or money, shall be divided equally among my surviving children.' A survived the testator, but died without issue; the other children surviving her. It was held that the word 'children' in this case included A, in the sense that her share

Exclusion of
illegitimates
does not apply
to gift over.

to a gift over to another on default of issue
of an illegitimate child. A testator made
two devises in favor of his illegitimate

¹ Jarman, 1081, for the substance of the paragraph.

² 'It is not because you find in the outward circumstances that there are some children whom you think that the testator ought to have provided for, that the will must be taken to mean that they are to be provided for, when the words in the will can have full and complete effect given to them if you interpret them in another and a legal sense without altering a single word.' Lord Hatherley, in *Dorin v. Dorin*, L. R. 7 H. L. 568, reversing L. R. 17 Eq. 463.

as one of the 'children' went over, on default of issue of hers, to the surviving children.¹

¹ *Smith v. Jobson*, 59 Law T. 397 (1888).

With regard to gifts to illegitimate children *en ventre sa mère*, the question is not whether they can take under the designation of 'children,' but whether they can take under any designation the plainest. It is not then a question of construction, and hence does not fall within the scope of the present subject. See Jarman, 1102-1114.

CHAPTER XVII.

SECONDARY CONSTRUCTION: WORDS.

GENERAL WORDS OF DEVISE.

By the term 'general devise' is meant, broadly speaking, a testamentary gift of lands not defined, — a gift of lands indeed, but a gift which does not in terms or by implication pass identified lands.

What is meant by a general devise.

Such a devise may appear in the earlier disposing part of the will or in the residuary clause. Thus a testator, in one of the earlier clauses of his will, says, 'I give all my real estate,' or, after the earlier clauses of disposition, 'I give all the rest and residue of my real estate'; in the first case the devise is always general if the testator has different estates of realty; in the second, it is general if he has not already disposed of all but some particular estate. In other words, a devise is general if it is not in terms or by implication specific.¹

We have next a matter of special definition, to be stated as the necessary condition to certain inquiries into construction. A testator, being owner of freehold and non-freehold lands, makes a devise of all his real estate; what is the effect of the

Effect of general devise.

¹ See *In re Huddleston*, 1894, 3 Ch. 595, 601; *Robertson v. Broadbent*, 8 App. Cas. 812. 'You have got a long way towards a specific gift if you come to the conclusion that' the testator 'is trying to describe something which he has.' *In re Nottage*, 1895, 2 Ch. 649, 664, Rigby, L. J.; *In re Weeding*, 1896, 2 Ch. 364, 368.

language — that is, how is such a devise to be defined? Laying aside the question whether the gift carries lands acquired after the making of the will, a subject elsewhere considered, the broad primary meaning in law of the language is that it is a gift of the testator's freehold lands, and of those only, unless statute has extended its meaning, as it has in certain States. At common law, estates less than freehold would not pass under a general devise, unless the testator had no freehold land and had, for instance, leaseholds.¹ The devise, too, by the common law, passed the freehold lands for life only, unless there was indication on the face of the will that the testator intended to give a greater estate; now, however, by statute, in most States of the Union,² the devise would carry the lands in fee, if the testator so owned them. The definite primary meaning, then, of words of general devise is a gift for life or in fee of the testator's freehold lands, according as his ownership is for life or in fee; and it may be, by statute, of his non-freehold lands also.³

Having thus fixed upon the primary meaning of the words, it is now to be observed that that meaning may be drawn in question by the context or other related language of the will, or by external facts, or by some ellipsis of intention. In such a case the whole will, in accordance with what has been said in Chapter XIV., should first be diligently examined, to see whether the testator himself may not have cleared up the doubt. If that

¹ *Rose v. Bartlett*, Cro. Car. 293; *Taylor v. Taylor*, 47 Md. 295.

² Not in Indiana. *Mulvane v. Rude*, 146 Ind. 476, 480. See *Korf v. Gerichs*, 145 Ind. 134, 136.

³ By statute in many States, following the Revised Statutes of New York, every grant or devise of real estate, or any interest therein, passes all the estate or interest of the grantor or testator, unless an intent to pass a less estate or interest shall appear by express terms or necessary implication. Kent, iv. 538.

examination fail, inquiry should be made whether or not the law may not have furnished some rule or rules by which the difficulty may be removed. A few cases of the latter kind will now be considered.

The primary meaning we have found for words of general devise covers the case of reversionary estates in

land; a reversion is the freehold, in fee or
 Reversions.

for life, subject to the prior particular estate, to return — revert — in possession to the owner upon the determination of the particular estate standing before it. Accordingly a general devise should pass reversions; and this it does, in the absence of evidence of intention to the contrary. It matters not whether such estates were in the testator's mind, as a matter of fact, or not. A testator gave to A the residue of all his estate, real and personal, after his wife had taken her thirds, no direct provision for her being made in the will. It was held that the gift included the reversion of the land assigned to the wife in dower, in the absence of language showing a different intention.¹ This is mere definition; that is, we have not yet had the primary meaning of any term drawn in question, nor have we had any ellipsis of intention to deal with. Let us now suppose some such difficulty.

Suppose in the case of a general devise by a testator who owns reversionary estates, that some of the limitations of the devise are not applicable to the reversions; will the reversions still pass? The answer, by a rule of law framed to meet such cases, is in the affirmative, provided that the limitations in question can be applied to other real estate disposed of by the will. A testator, having an estate in reversion and other lands, devised his lands generally, charging them with the payment of

¹ *Yeomans v. Stevens*, 2 Allen, 349.

annuities to three persons for life, one of whom was tenant for life of the lands of which the testator had the reversion, so that the charge towards him was void. It was held that the devise carried the estate in reversion, for though the annuity could not be charged upon the particular property, there was other land of the will, upon which it could be charged.¹

Mortgages of freehold estates in land, in fee or for life, on the side of the mortgagee, also fall within the definition of words of general devise; a general devise by the mortgagee passes the estate. But what estate? for a mortgage imports a double interest in the mortgagee, to wit, the legal title, potentially,² to the mortgaged estate and a right to payment of the debt; which two estates may be called, respectively, the legal and the beneficial estate. A doubt thus arises upon the face of the will, which, let it be assumed, is not removed by any language of the instrument; and the question is, whether the law has any rules to meet the case.

In regard to the legal estate, it has long been settled, at common law, that the devise will pass it, if no evidence of a different intention appears. A mortgagee of lands in fee devised all the rest, residue, and remainder of his estate, real and personal, of whatever kind, not before disposed of, to A, his heirs and assigns forever. It was held that the legal estate in the mortgaged property passed.³

¹ Doe v. Weatherby, 11 East, 322; Doe v. Fossick, 1 Barn. & Ad. 186.

² By the common law the mortgagee had the legal title *actually*; but statute has modified the case in most if not in all the States.

³ Ex parte Sergison, 4 Ves. 147.

The same question in substance would be raised in the case of a general devise by a trustee of estates held in trust, and the answer would be the same.
 Effect upon trust estates. A testator had devised lands to trustees upon trust for paying debts and settling the estates. Afterwards, and after the death of the trustees, the heir of the last one devised all his 'real estates whatsoever and wheresoever' to his wife, her heirs and assigns forever. It was held that this passed the legal estate in the lands devised in trust; and it was now laid down that trust estates will pass under a general devise, unless it can be collected, from expressions in the will or from the purposes of the testator, that he did not mean that they should pass.¹ In another case a surviving trustee under a will devised all his real estate, not otherwise disposed of, to his godson, his heirs and assigns, and it was held that the trust estate passed.²

It is equally true that at common law a general devise of lands will *not* pass the beneficial interest of the testator in lands mortgaged to him; that is, the
 Beneficial interest of mortgagee. words of devise will be construed not to carry to the devisee any right to the debt secured by the mortgage, unless a contrary intention is shown.³ The devisee is at most merely a trustee for the person entitled to receive payment of the debt.⁴ On the other

¹ *Braybroke v. Inskip*, 8 Ves. 417, Lord Eldon; *Jackson v. Delancy*, 13 Johns. 537; *Heath v. Knapp*, 4 Barr, 228; *Kent*, iv. 538, 539. This common-law principle applies as well to mortgaged as to trust estates.

² *Bainbridge v. Ashburton*, 2 Younge & C. 347.

³ *Marshall v. Hadley*, 50 N. J. Eq. 547, 549. It would be otherwise, it seems, if the mortgage operated as a conveyance of land described in it, so that the testator became beneficial owner of the land for all purposes. *Id.* By force of a mortgage the mortgagee does not acquire the land as owner, but simply acquires a right to hold it as security for the debt. *Id.*

⁴ So where the devise is specific. *In re Clowes*, 1893, 1 Ch. 214,

hand, a devise of all the lands of the testator held by him in mortgage would pass the beneficial interest, that is, the debt, but not the legal estate in the lands.¹ And the same would be true if property comprised in a general devise should be subjected to the payment of debts, legacies, or other charges, or if the will contained provisions to which it could not be supposed that the testator intended to subject property not beneficially his own.²

The subject of the foregoing remarks must be understood to relate to mortgages in fee or freehold. Mortgages of less estates, as for instance of leasehold interests, are in law no more than Mortgages of leasehold estates. personal property, and words of general devise of the testator's lands would not, it seems from what has already been stated, be construed to pass to the devisee the legal estate, or at common law the beneficial interest, unless the testator had no freehold estates upon which the will could take effect.³ The legal estate would pass to the testator's executor, who would receive payment of the debt for those ultimately entitled. But the statutes should be consulted upon the point.

Another instance of a rule to supply an omission of the testator may be seen in a case of a general devise of land to vest in futuro, where the produce Undisposed-of income. meantime is not disposed of. Such produce, by rule laid down by the courts, passes under a residuary general devise, unless a different intention appears.

217, Lindley, L. J.: 'If a testator specifically devises a particular estate, which is only a mortgage estate, and not the money charged on it, the devisee is only a trustee for the persons entitled to the money.'

¹ *Martin v. Smith*, 124 Mass. 111.

² *Jarman*, 649.

³ *Ante*, p. 207.

Thus a testator devises all his real estate to A upon his attaining the age of twenty-one, and to B if A shall die under age, and he then devises all the rest and residue of his real estate to C. C is entitled to the rents and profits of the land until A becomes twenty-one, if A lives to attain majority. If he should die under twenty-one, B would be entitled to the rents and profits until A's death.

GENERAL WORDS OF LEGACY.

By the term 'general legacy' is meant, broadly speaking, a testamentary gift of personalty not defined, — a gift of chattels, indeed, but a gift which does not in terms or by implication pass identified chattels. As in the case of a general devise, such a legacy may appear in the earlier disposing part of a will or in the residuary clause. Thus: 'I give all my personal estate,' or 'all my goods and chattels'; 'I give all the rest and residue of my personal estate,' or 'of my goods and chattels.'¹

¹ A testator gave 'debenture stock or shares,' in certain companies, having such property in them. It was contended that the gift was general, and hence that the amount given should be purchased and not taken out of what he had. The court held the contrary; the gift was deemed specific. In *re Nottage*, 1895, 2 Ch. 657, Rigby, L. J.: 'The case is totally different from that of a testator saying, "I give to A B £1000 consols." Consols are a common form of investment, and in such a gift there is nothing to lead to the conclusion that he meant the gift to be part of the consols which he had.' There were, however, expressions which agreed better with the hypothesis that the gifts were specific than that they were general, as the same learned judge said.

What legacies are specific, general, or demonstrative, a subject not entered into in the text, see, among recent cases, *In re Pratt*, 1894, 1 Ch. 491; *Page v. Young*, Law Rep. 16 Eq. 501; *Mytton v. Mytton*, id. 30; *Robinson v. Addison*, 2 Beav. 515; *Maybury v. Grady*, 67 Ala.

What is the effect of such a gift? The question may be shortly disposed of here. The words 'goods and chattels' or 'effects,' in a legacy of all one's 'goods and chattels' or 'effects,' in their primary meaning, comprise the entire personal estate of the testator. This comprehensive signification as the primary meaning of the words has gained great firmness in recent times, at least in England. Indeed it is broadly laid down in that country, with reference to such words, that words naturally of comprehensive import must be taken in their full extent, unless some very distinct evidence appears for treating them as intended in a restricted sense.¹

But such words as 'goods,' 'chattels,' and 'effects' are often accompanied by other words of personalty of more restricted sense. That alone would not, according to English authority, be enough to affect the case;² but

147; *Hutchinson v. Fuller*, 75 Ga. 88; *Morton v. Murrell*, 68 Ga. 141 (gift of money payable out of a specified fund is general, by statute); *Roquet v. Eldridge*, 118 Ind. 147; *Addington v. Smith*, 83 Maine, 551; *England v. Prince George Parish*, 53 Md. 466; *Harvard Soc. v. Tufts*, 151 Mass. 76; *Bradford v. Brinley*, 145 Mass. 81; *Tomlinson v. Bury*, id. 346; *Metcalf v. Framingham Parish*, 128 Mass. 370, 373; *Le Rougetel v. Mann*, 63 N. H. 472; *Moore v. Moore*, 50 N. J. Eq. 554; *Hayes v. Hayes*, 45 N. J. Eq. 461; *Tift v. Porter*, 8 N. Y. 516; *Glass v. Dunn*, 17 Ohio St. 413; *Sponsler's Appeal*, 107 Penn. St. 95; *Hammer's Estate*, 158 Penn. St. 632; *Johnson's Estate*, 170 Penn. St. 177; *Bowen v. Dorrance*, 12 R. I. 269; *McFadden v. Hefley*, 28 S. C. 317; *Martin v. Osborne*, 85 Tenn. 420; *Hood v. Haden*, 82 Va. 588; *Myers v. Myers*, 88 Va. 131; *Hibler v. Hibler*, 104 Mich. 274; *Wheeler v. Wood*, id. 414.

¹ *Jarman*, 715. See *Arnold v. Arnold*, 2 Mylne & K. 365.

² 'The mere enumeration of some items before the words "other effects" does not alter the proper meaning of those words.' *Arnold v. Arnold*, 2 Mylne & K. 365, Lord Cottenham, M. R., overturning the doctrine of Lord Eldon in *Hotham v. Sutton*, 15 Ves. 319, which has been much followed in this country, as it had been in England. See *Richardson v. Hall*, 124 Mass. 228; *Dole v. Johnson*, 3 Allen,

the accompanying words clearly *may* be of a nature to throw the meaning of the words in question into doubt. This doubt may, in turn, often be resolved by the accompanying words, by force of the rule, or canon of interpretation, 'noscitur a sociis.' That rule is considered in the preceding chapter.

It only needs to be added here that the words 'goods,' 'schattels,' 'effects,' and the like general words of personality, while in later authorities they have gained firmness of meaning, seem more sensitive to the influence of accompanying words of personality of restricted sense than does the word 'estate' or its cognate 'property,' which, *prima facie*, embraces realty. And the reason is plain; one is more apt to use general words of personality in some restricted sense of the same kind of property than to use a general term which naturally embraces realty in the sense of a totally different kind of property.

364; *Bills v. Putnam*, 64 N. H. 554; *Hoopes's Appeal*, 60 Penn. St. 220; *Tefft v. Tillinghast*, 7 R. I. 434; *Gooch v. Gooch*, 33 Maine, 535; *Adams v. Jones*, 6 Jones, Eq. 221; *Hurdle v. Outlaw*, 2 Jones, Eq. 75; *Dalrymple v. Gamble*, 68 Md. 523; *Wolf v. Schaeffner*, 51 Wis. 53.

It is believed, however, that Lord Cottenham's rule is the better one. To harden the meaning of the word is to make the interpretation simpler and more certain, and is quite as likely to meet the testator's intention.

CHAPTER XVIII.

SECONDARY CONSTRUCTION: CLAUSES.

WE have now reached the subject of secondary construction in relation to the meaning or existence of whole clauses. The first topic for consideration thereunder is the special feature of certainty called certainty of object and subject.

CERTAINTY OF OBJECT AND SUBJECT.

The certainty which construction seeks to make out is, in particular, certainty both of the person or object of gift, and of the property or subject of gift; A matter both of primary and secondary construction. failure of the testator to express himself with certainty in either of these points being fatal, unless some rule of construction can be summoned in aid; except in cases of public charity at common law, of which in its place. The topic, as has been stated elsewhere,¹ is one of construction in general, relating equally to primary and secondary methods; but where simple interpretation might be unequal to the purpose sought, rules of construction may often find place for determining the legal meaning of the language. We have then to consider the topic of certainty of object and subject in the light of rules of construction. Matters pertaining to object and subject alike will first be considered.

¹ Ante, p. 150.

The requirement of certainty is not a requirement that the dispositions of the will must be absolutely free from mistake. It matters not that description or statement may be defective or even erroneous, if still there is enough in the will or in things legally related to it to remove the defect or to correct the error. In other words, if the will supply the means of identifying the defectively or erroneously named or described subject or object, the case is not one of fatal uncertainty.¹ Thus there may be a total mistake of name in the occupant of a house devised, or in the name or location of the house; but if there is otherwise a sufficient description of it, the devise will be good. The part fixed upon must, however, be such that it is plain that the rest can be rejected without defeating, or, rather, as following, the real intention of the testator, as in the example just mentioned, where the house is described by name, — for instance, Fleetwood House in L; for there is by the name an adequate description, and any erroneous addition may be disregarded.

It is accordingly a settled rule of law that if there be first an unambiguous and certain description of persons or things, and then another description failing in certainty or accuracy, the latter must be rejected.² So if a description be false in part, but sufficient remain to identify what is intended, the false will be rejected

Certainty followed by uncertainty of same thing: correcting mistake.

¹ See *Rogers v. Rogers*, 78 Ga. 688; *Missionary Society v. Mead*, 131 Ill. 338; *Drew v. Drew*, 28 N. H. 489; *Stephens v. Powys*, 1 DeG. & J. 24.

In some cases the mistake is not fatal, though the will does not supply the means of correction, as where the testator did not have the thing given, but had something like it. In *re Weeding*, 1896, 2 Ch. 364, *infra*.

² *Jones v. Robinson*, 78 N. C. 396; *Patch v. White*, 117 U. S. 210;

and the gift sustained; ‘falsa demonstratio non nocet;’¹ ‘veritas nominis tollit errorem demonstrationis.’ But the rule is otherwise if a sufficient description does not remain after rejecting the false. Evidence will not be received in such a case to correct the mistake.² Thus if a testator devise land as lying in ‘section thirty-two,’ where he has no land, evidence will not, according to the better rule, be received to show that the testator meant section thirty-three, where he had land, and that the draftsman of the will made a mistake in the matter.³ The will alone can furnish the means of correcting the mistake; if it does not, the gift falls into the residue if there be a residuary clause, or goes as intestate property if there be no such clause.

Non-charitable trusts furnish another illustration; besides sufficient words of trust, there must be certainty both of subject and of object to make the trust complete. Charitable trusts, as we ^{Non-charitable trusts.} shall see later in this chapter, stand upon a footing of

Benson v. Corbin, 145 N. Y. 351. The order of description is not necessarily material; the erroneous description may come first and the true one follow. A testator devised to ‘*William Piteairne*,’ eldest son of Charles Piteairne. The eldest son of Charles was Andrew, not William, and Andrew was held entitled; the words ‘eldest son’ having served to make clear the one intended by the name preceding. *Piteairne v. Brase*, Finch, 403. See also *Dowset v. Sweet*, Ambl. 175, where ‘sons’ following a wrong name served to make it clear who was meant. For other examples see *Jarman*, 350 et seq.

¹ *Kanouse v. Slockbower*, 48 N. J. Eq. 42, 45; *Whitcomb v. Rodman*, 156 Ill. 116.

² *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674. Contra, perhaps, *Rook v. Wilson*, 142 Ind. 24. But it was there considered that the language of the will showed the intention sufficiently. See also *Whitcomb v. Rodman*, 156 Ill. 116.

³ *Kurtz v. Hibner*, 55 Ill. 514. See *Fitzpatrick v. Fitzpatrick*, supra. But see *Creasy v. Alverson*, 43 Mo. 13, contra, and *infra*, p. 224.

their own.¹ But there is a distinction in non-charitable trusts, as well as in charitable trusts, between uncertainty of subject and uncertainty of object. A clearly created trust will not fail for indefiniteness or uncertainty of the donee merely; for a trust being clearly created, it is plain that the trustee was not to take beneficially, as he would or might if the trust were to fail entirely. Hence the trustee must still hold in trust, and the trust will stand in favor of the person entitled to take under the doctrine of void gifts heretofore stated.² But if there is uncertainty of the subject of gift, the trust must wholly fail; the trust itself is uncertain in such a case. It is then worthy of notice that when the trust fails because of uncertainty in the subject, the donee takes the property to his own use; when it fails for uncertainty only in the object, the donee takes for the use of the residuary devisee or legatee.

CERTAINTY OF OBJECT AND SUBJECT: CONTRADICTION:
PREFERENCE OF LATER OF TWO CLAUSES.

The testator's intention must, if possible and lawful, be carried out. It follows that the courts are bound to give effect, as far as they can, to every word of the instrument, without change or rejection.³ But it may be that parts of the will are contradictory. In such cases, where it is found

Effect to be
given to every
word if pos-
sible.

give effect, as far as they can, to every word of the instrument, without change or rejection.³

But it may be that parts of the will are contradictory. In such cases, where it is found

¹ Post, p. 226.

² Ante, p. 217. But in a case of doubt whether any trust at all has been created, it may be taken against such a thing that the testator has left in uncertainty the person to benefit by the supposed trust. See *Stead v. Mellor*, 5 Ch. D. 225; *Tilden v. Green*, 130 N. Y. 29.

³ From a note by the present writer, in *Jarman*, 436. See *Quarm v. Quarm*, 1892, 1 Q. B. 184, 186; *Gray v. Minnethorpe*, 3 Ves. Jr. 103; *Dickison v. Dickison*, 138 Ill. 541; *Homer v. Shelton*, 2 Met. 202; *Lasher v. Lasher*, 13 Barb. 106; *Rogers v. Rogers*, 49 N. J. Eq. 98.

impossible to form out of the discordant parts any consistent whole, the last one, whether the contradiction relate to object or to subject, will prevail (unless other rules of law interfere) as indicating, in the eye of the law, the testator's latest intention.¹ Thus a devise of an undivided part of the testator's real estate must yield to a later clause authorizing the executors, at their discretion, to sell and convey part or the whole of the testator's real estate.²

But, as already has been intimated, this rule is to be applied only where the particular clauses or provisions are totally inconsistent with each other, and where the real intention of the testator cannot otherwise be made out. Rejecting one clause to uphold another is a desperate remedy; necessity alone will justify it.³ Thus later clauses are not to be considered as inconsistent with and repugnant to prior clauses, if they may take effect as qualifications to them without defeating the testator's intention in making the prior gift.⁴ An example may be seen in the case of a

Rejecting
clauses a des-
perate remedy.

¹ *Jenks v. Jackson*, 127 Ill. 341; *Dickison v. Dickison*, 138 Ill. 541; *Butler v. Moore*, 94 Ind. 359; *Claffin v. Ashton*, 128 Mass. 441; *Homer v. Shelton*, supra; *Rogers v. Rogers*, supra; *Pickering v. Langdon*, 22 Maine, 430; *Covent v. Sebern*, 73 Iowa, 564; *Bradstreet v. Clarke*, 12 Wend. 602; *Baird v. Baird*, 7 Ired. Eq. 265; *Miller v. Flournoy*, 26 Ala. 724; *Lewis's Estate*, 3 Whart. 162; *Hart v. Stoyer*, 164 Penn. St. 523; *Waring v. Boshier*, 91 Va. 286; *Manning v. Thruston*, 59 Md. 218; *Ellis v. Throckmorton*, 52 N. J. Eq. 792, 799.

² *Pratt v. Rice*, 7 Cush. 209, 212.

³ *Jenks v. Jackson*, 127 Ill. 341; *Viele v. Keeler*, 129 N. Y. 190, 199; *Davis v. Hoover*, 115 Ind. 423; *Claffin v. Ashton*, 128 Mass. 441; *Hart v. Stoyer*, 164 Penn. St. 523; *Jones v. Strong*, 142 Penn. St. 469. See *Quarm v. Quarm*, 1892, 1 Q. B. 184, 186; *In re Seal*, 1894, 1 Ch. 316.

⁴ *Wager v. Wager*, 96 N. Y. 164; *Taggart v. Murray*, 53 N. Y. 233; *Shalters v. Ladd*, 141 Penn. St. 505.

devise to A and his heirs forever, followed by an executory devise over to another. The latter clause could not, in reason, be taken to destroy the former; it is to be considered a qualification of it, the first clause being held so far short of being, what it is by itself, absolute.¹ So, too, where it is manifest from the language of the will that since writing out the absolute gift the testator has changed his mind and determined to cut it down, the earlier clause will be qualified accordingly. This may occur not only in a codicil modifying an absolute gift in the will, but in another part of the same instrument in which such gift is made.

Indeed, though there be no manifest change of mind by the testator, if still the instrument shows a general intent inconsistent with the gift of the absolute estate as only showing a special intent, the general intent will ordinarily prevail, and the absolute gift will be cut down accordingly.² A

General intent
and particular
intent.

¹ The distinction between such a case and an attempt to take away the incidents of an estate is clear, as elsewhere noticed. *Shalters v. Ladd*, *supra*.

² *Price v. Cole*, 83 Va. 343; *Houser v. Ruffner*, 18 W. Va. 244; *Wager v. Wager*, 96 N. Y. 164; *Hollingsworth v. Hollingsworth*, 65 Ala. 321; *McMurry v. Stanley*, 69 Texas, 227. So of description. *Thomson v. Thomson*, 115 Mo. 56; *Martin v. Smith*, 124 Mass. 111, 113.

A fortiori will the general intent prevail where the particular intent is in doubt and must be construed. See *Hale v. Hobson*, 167 Mass. 397; *Lee v. Welch*, 163 Mass. 312; *Niles v. Almy*, 161 Mass. 29, 31; *Moffett v. Elmendorf*, 155 N. Y. 475, 487, 488.

It is not always true that the general intent is to prevail over the inconsistent particular intent. A general scheme of charity, for instance, may in this country fail because of the failure of the particular intent in respect of the donee. *Stratton v. Physio-Medical College*, 149 Mass. 505; *Bullard v. Shirley*, 153 Mass. 559, 560. In the latter case *Holmes, J.*, said: 'Assuming that the object is a charity, still there is no universal principle that the testator's particular intentions must be sacrificed by reason of that general object.'

testator gave his wife all his real and personal estate, to hold to herself, her heirs and assigns forever. Then he proceeded with provisions for various legacies, and finally devised and bequeathed the residue of his real and personal estate to certain persons to be divided equally between them at his wife's death. It was considered that the provisions following the absolute gift to the wife indicated the general intention of the testator, and that the gift to the wife must be cut down accordingly.¹

The rule just stated in regard to general and special intents prevails over the rule that the latest of two inconsistent clauses or provisions should govern.² Hence where such intents plainly appear on the face of the will, it matters not in what order they occur; the general intent will prevail, though it occur before the special one. By 'general intent' appears to be meant the (or some) chief, pervading, or central purpose or scheme of the testator. Obviously particular provisions and descriptions should be treated as subordinate to such a purpose or scheme, so far as, by the words of the will, they affect it. And as a matter of fact the courts are constantly looking at the general purpose or scheme of the testator in order to construe particular expressions.³

Further, while it is, in general, true that of two absolutely contradictory clauses in the instrument, the first must give way, still the two clauses must refer to the same subject-matter for the purposes of the rule.⁴ And though the two clauses do refer to the same subject-matter, still the first

The two clauses must relate to same thing.

¹ *Sherrat v. Bentley*, 2 Mylne & K. 149. Lord Brougham said it was a case in which the testator had either changed his mind or did not understand the force of the words used in the gift to his wife. But Sir John Leach, M. R., in the lower court treated the case as one of general and special intent.

² *Price v. Cole*, 83 Va. 343.

³ See, e. g., *Clarke v. Clarke*, 145 N. Y. 476, 481: 'The scheme of the will seems to be,' &c.

⁴ *Sheetz's Appeal*, 82 Penn. St. 213.

one is not to be disturbed further than is necessary.¹ English authority has gone a long way in upholding this doctrine. According to the older authorities, if real estate is devised to A in fee, and then, in a later part of the instrument, it is devised to B, the later provision must prevail, and B take in exclusion of A.² But more recent English authority has declared that A and B should take concurrently, though it is conceded that B alone would take if the devise to him were in another instrument.³ It is doubtful, too, whether the doctrine extends to indivisible chattels.

The rule that the later of two conflicting clauses must prevail over the earlier is further subject to the rule that Rejecting words which cannot be reconciled with the words. context are to be rejected. The position occupied by the words, whether they are before, after, or within the part with which they cannot be reconciled, makes no difference. For the intention of the testator is the thing to be sought for, and that is to be found

¹ *Doe v. Davies*, 4 Mees. & W. 599; *Henning v. Varner*, 34 Md. 102.

² *Coke*, Litt. 112; *Plowden*, 541; *Ulrich v. Litchfield*, 2 Atk. 374. To the same effect, *Hollins v. Coonan*, 9 Gill, 62.

³ *Sherrat v. Bentley*, 2 Mylne & K. 165, Lord Brougham: 'If in one part of a will an estate is given to A, and after the same testator gives the same estate to B, adding words of exclusion, as "not to A," the repugnance would be complete, and the rule [that the later clause governs] would apply. But if the same thing be given, first to A, and then to B, unless it be some indivisible chattel, as in the case Lord Hardwicke puts in *Ulrich v. Litchfield*, the two legatees may take together without any violence to the construction. It seems therefore by no means inconsistent with the rule, as laid down by Lord Coke and recognized by the authorities, that a subsequent gift, entirely and irreconcilably repugnant to a former gift of the same thing, shall abrogate and revoke it, if it be also held that, where the same thing is given to two different persons, in different parts of the same instrument, each may take a moiety; though had the second gift been in a subsequent will, it would, I apprehend, work a revocation.'

in the general tenor of the instrument.¹ A testatrix bequeathed an annuity to A, B, and C, and their heirs, to be equally divided between them 'in the order they are now mentioned.' The quoted words were rejected; to divide a fund between several persons in a given order was mere nonsense. There could be no division if there was an order in which the persons were to take.²

CERTAINTY OF OBJECT AND SUBJECT: EXTERNAL AID.

It will be noticed from what has already been said that certainty whether of subject or object need not appear by specific description on the face of the will;³ no law limits the operation of the will to what its own language alone defines. A maxim or rule of law of wide application declares that that is certain which the instrument *enables* one to ascertain, though this require a reference to things external to the will. 'Id certum est quod certum reddi potest.' This rule may be resorted to both of subject and of object, and indeed in aid of anything to which it is suited.

It is accordingly no valid objection to a gift that the testator has, for instance, left the devisee or legatee to be ascertained by some future act or event, provided, of course, the will requires that the person shall be ascertained within the period fixed by the rule against perpetuities. A testatrix, who was a partner with others in business, by her will directed that her property should be disposed of and divided among her partners who

¹ Jarman, 444.

² *Smith v. Pybus*, 9 Ves. 566. Further see *Morrall v. Sutton*, 4 Beav. 478; *Chambers v. Brailsford*, 18 Ves. 368. But words must not be rejected unless they cannot be reconciled with the context. In *re Seal*, 1894, 1 Ch. 316, 321.

³ See also the incorporation of external documents, *ante*, p. 59.

should be such at the time of her death, or to whom she might have disposed of her business. The gift was held valid in favor of persons, some of them being her partners, to whom she had disposed of her partnership interest.¹

Reference to occupancy often comes in aid of defect or error of locality, as locality may correct an error of occupancy. A testator devised his lands at A in the county of B, 'in the occupation of C,' whereas he had no such lands in the county of B; but he had lands in the county of D, occupied by C, and it was held that these were intended and should pass.² But possibly the result would have been the same in this case had there been no mention of occupancy, 'for,' it is said, 'the misnomer of the county in which a parish is situate produces no uncertainty, unless the testator should happen to have property answering to the description in a parish of that name in more than one county.'³

Having now considered the rule of certainty as applicable to both its parts alike, it remains to consider it in relation to its parts severally. First, then, of certainty of object.

CERTAINTY OF OBJECT.

Uncertainty of object, that is, of person, often appears in one of three or four forms; first, the testator may have left the object vague and unascertainable, the person not being described as a member of a class; or, secondly, the testator may have given to some of the members of a defined class or number without indicating how such members are to be

Forms of uncertainty of object.

¹ *Stubbs v. Sargon*, 2 Keen, 258; affirmed, 3 Mylne & C. 507.

² *Hastead v. Searle*, 1 Ld. Raym. 728. See *In re Seal*, 1894, 1 Ch. 316.

³ *Jarman*, 348. But see ante, p. 217. Further see *In re Seal*, 1894, 1 Ch. 316.

ascertained, or he may have given to the members of a class in succession, without declaring the order in which they are to take. To these cases may be added the case of a description accurate enough on its face, but not, as it stands, answering to any existing person or corporation because of misnomer, or misdescription. And there are still other cases of indefiniteness of object.¹

Of uncertainty of the first kind, the case may be mentioned of an attempt to identify the legatee or devisee by description in whole or in part, instead of by name alone, the description being ^{First kind of} ^{uncertainty.} more or less defective. Defective description may be of all grades, from downright unintelligibility to some slight matter which still, especially with the context, leaves it reasonably clear whom the testator intended. And even in the case of what is unintelligible on the face of the will, the defect may be a matter to be cleared up by external evidence.²

Of uncertainty of the second kind such cases as the following may be mentioned: Gift to one of the sons of A, who has several sons.³ Gift to twenty ^{Second kind of} ^{uncertainty.} of the poorest of the testator's relatives, without indicating who are the poorest or how the fact is to be ascertained.⁴ Gift 'to the testator's brother and

¹ See, e. g., *Olliffe v. Wells*, 130 Mass. 221; *Smith v. Smith*, 54 N. J. Eq. 1.

² The following are a few of many cases relating to such questions: *Gilmer v. Stone*, 120 U. S. 586; *Patch v. White*, 117 U. S. 210; *Jacob v. Bradley*, 36 Conn. 365; *Hazeltine v. Vose*, 80 Maine, 374; *Nason v. First Bangor Church*, 66 Maine, 100; *Howard v. American Peace Soc.*, 49 Maine, 288; *Missionary Soc. v. Chapman*, 128 Mass. 265; *Congregational Soc. v. Hatch*, 48 N. H. 393; *Townsend v. Downer*, 23 Vt. 225; *Hill v. Bowman*, 7 Leigh, 650; *Smith v. Smith*, 4 Paige, 271.

³ *Whitesides v. Whitesides*, 28 S. C. 325.

⁴ *Webb's Case*, 1 Rolle, Abr. 609 (D) 1.

sister's family,' the testator having more than one sister.¹ The gift fails in such cases. In the case of a gift to a charity named, if there are two different charities of the name in the particular place the gift will be divided equally between them.²

Where the testator has given to members of a class, or to persons named, to take in succession without declaring the order in which they are to take, the gift may, it seems, be saved by following the order in which the devisees or legatees are named, or, in the case of a class by birth or relationship — such as sons, daughters, brothers, or sisters — by order of seniority. A testator devised to A and his brothers in succession, one month after their several marriages. It was held that the brothers should take according to their ages; A, who was eldest, taking first, then the next in age, and so on.³

Indefiniteness in the object of a gift to a public charity, however, which brings us to the third class of cases, stands upon a footing of its own. Third kind: gift to charity. Where the English law of charities prevails in this particular, as it does in many of the States, indefiniteness in respect of *individual objects*, so far from being ground for treating the gift as invalid, is a necessary ground of its validity.⁴

Indefiniteness of those who compose the general object is part of the definition of a public charity, according to the English law. An example may be seen in the case

¹ Doe v. Joinville, 3 East, 172.

² Gilmer v. Stone, 120 U. S. 586; In re Clergy Society, 2 Kay & J. 615; In re Alchin, L. R. 14 Eq. 230. Not so if the gift were to individuals; it would be void for uncertainty, unless the doubt could be removed by external evidence.

³ Ongley v. Peale, 2 Ld. Raym. 1312. Compare Thomason v. Moses, 5 Beav. 77, where the gift was held void for uncertainty.

⁴ Sawtelle v. Witham, 94 Wis. 412.

of a gift to trustees for the poor,¹ or for the education of poor children, or towards the maintenance of a good common school in L.² So of a gift for the poor of two churches named.³ If individual participants in the gift in such cases were named, the gift would not be charitable, and so far as it depended upon the law of charities it would accordingly fail.⁴

In gifts to *private* charity, however, and in gifts to public charity in States in which, as in New York, such gifts are put by statute upon the footing of gifts to private charity, indefiniteness of object often amounts to uncertainty such as to prevent the gift from taking effect. It is in such States well-established doctrine that there must be a defined beneficiary named in or capable of being ascertained by the will, and that it is not enough that a power of selection is given by the will to the testamentary trustee.⁵ Indeed it is everywhere the law,

¹ *Darcy v. Kelley*, 153 Mass. 433.

² *Leeds v. Shaw*, 82 Ky. 79.

³ *Union Church v. Wilkinson*, 36 N. J. Eq. 141. But the English law goes much further than the American law of any State, in support of indefiniteness of object. See for instance *In re White*, 1893, 2 Ch. 41. In England a power exercised by the royal sign manual prevails for making good a defective scheme of charity, which is unknown to the law of this country; though a narrower doctrine of equity, called the *cy près* doctrine, or doctrine of approximate intention, does prevail here. See *Moore v. Moore*, 4 Dana, 366; *Jackson v. Phillips*, 14 Allen, 539, 576-590; *Weeks v. Hobson*, 150 Mass. 377; *Grimes v. Harmon*, 35 Ind. 198; *Story*, Eq. Jur. ii. § 1168, and note, 13th ed. Further see *Tilden v. Green*, 130 N. Y. 29, 45, 67.

⁴ But the benefit may be restricted to particular classes, as poor seamen or laborers of a town. *Burbank v. Burbank*, 152 Mass. 254, 256; *Kent v. Dunham*, 142 Mass. 216.

In some States it matters not how vague, indefinite, or uncertain the objects of the gift, if a discretionary power is vested in some one to apply the gift in charity. *Kinike's Estate*, 155 Penn. St. 101.

⁵ *People v. Powers*, 147 N. Y. 104, 109; *Tilden v. Green*, 130 N. Y. 29; *Rose v. Hatch*, 125 N. Y. 427; *Read v. Williams*, id. 560; *Fosdick*

even in the case of gifts to public charity, that, is to charity in the ordinary sense, that there must be certainty of object in the sense of some one, such as a city, church, or other body, corporate or not, or an individual trustee, who can call upon the courts to enforce the terms of the gift in case of need.¹ Down to that point gifts in charity do not differ from other gifts. A testator gave legacies 'for masses for the repose of' his soul, and other masses for the dead. The gifts were held invalid; there would be no one to invoke the aid of the courts to enforce them.²

A general case of misnomer occurs where a testator makes a gift to his 'nephews' or 'nieces,' or both, having no such relatives of his own, but having a wife who has them. Primarily, of course, the words are to be taken in the sense of relations by blood, but where the evidence shows the case just mentioned the 'nephews' or 'nieces' by marriage will take.³

Gifts to unincorporated bodies may also be noticed in this connection. In several of the States these are invalid for one reason or another; in some on the ground of incapacity in the beneficiaries, in others on the ground of remoteness or vio-

v. Hempstead, id. 581 (support of poor of town too indefinite); *Holland v. Alcock*, 108 N. Y. 312; *In re Hoffen*, 70 Wis. 522; *Children's Aid Soc. v. Johnston*, 58 Md. 139; *Powell v. Hatch*, 100 Mo. 592. See *Bird v. Marklee*, 144 N. Y. 544.

¹ *McHugh v. McCole*, Sup. Court, Wisconsin, 1897; *Fosdick v. Hempstead*, and other cases just cited.

² *McHugh v. McCole*, *supra*; *Holland v. Alcock*, 108 N. Y. 313.

³ *Sherratt v. Mountford*, L. R. 8 Ch. 928, 931; *In re Fish*, 1894, 2 Ch. 83, 85.

lation of the rule against perpetuities.¹ But more commonly gifts to such bodies are held valid where they do not contravene the rule against perpetuities, as they would if they were to a body *to be* incorporated unless within the period prescribed by such rule.² If, however, the gift is to a specified corporation, as a matter of substance, and that body is not in existence, or cannot take the gift at the testator's death, the gift fails.³

Omitting the name of the trustee of a trust is not a case of uncertainty. Equity will not allow a trust to fail for want of a trustee named. When Omission of trustee. land, for instance, is devised for a public charity, and no trustee is named, the testator's heir takes in trust for the charity, or equity will appoint a trustee.⁴

Thus far of certainty of object. Next, of certainty of subject.

CERTAINTY OF SUBJECT: REPUGNANCY.

What is called the doctrine of repugnancy makes one of the chief topics under this head. This doctrine relates to cases in which a clear gift of property is Doctrine of repugnancy. followed by words repugnant to or inconsistent with the interest so given, and puts an end to

¹ See *Barnum v. Baltimore*, 62 Md. 275; *Methodist Church v. Clark*, 41 Mich. 730; *Little v. Willford*, 31 Minn. 173; *White v. Howard*, 46 N. Y. 144; *Rhodes v. Rhodes*, 88 Tenn. 637; *Mong v. Roush*, 29 W. Va. 119.

² *Tilden v. Green*, 130 N. Y. 29, 47; *Seda v. Huble*, 75 Iowa, 429; *Dascomb v. Marston*, 80 Maine, 223; *Lilly v. Tobbein*, 102 Mo. 104; *Gray, Perpetuities*, §§ 608 et seq. See *Lougheed v. Dykeman Church*, 129 N. Y. 211, 215.

³ *Stratton v. Physio-Medical College*, 149 Mass. 505; *Bullard v. Shirley*, 153 Mass. 559.

⁴ *Missionary Soc. v. Chapman*, 128 Mass. 265; *Sohier v. Burr*, id. 221; *Fellows v. Miner*, 119 Mass. 541, 544.

the uncertainty by cutting off the later repugnant words; thus furnishing another limitation to the rule that the later of two inconsistent clauses must prevail. The following may be stated as typical cases:—

If an estate in fee-simple absolute is given to a man, followed by language inconsistent with the existence, as by taking away the legal incidents, of such an estate, that language must be disregarded so far as it might affect the absolute estate given. In other words, it is repugnant to the gift, and is void.¹ Thus, 'I give and devise to my wife and her heirs all the rest and residue of my real estate. But on her decease the remainder thereof I give and devise to my said children or their heirs respectively, to be divided in equal shares between them.' Applying the rule, the testator's widow takes the fee-simple in the residue; the gift over in remainder is void for repugnancy.² And so in general of a gift over of 'what remains' after an absolute gift.³

A similar case would arise if a testator should give an estate to A absolutely, but then declare that if A should sell the property, he should give a certain sum out of the proceeds to B; the latter provision would be void.⁴ And so if a testator, giving his property to trustees upon certain trusts, should direct that a sum of money, of which

¹ *Foster v. Smith*, 156 Mass. 379, 381; *Joslin v. Rhoades*, 150 Mass. 301, 303; *Collins v. Wickwire*, 162 Mass. 143, 144; *Van Horne v. Campbell*, 100 N. Y. 287; *Taylor v. Brown*, 88 Maine, 56; *Mitchell v. Mitchell*, 77 Maine, 423; *Benz v. Fabian*, 54 N. J. Eq. 615; *Wilson v. Wilson*, 46 N. J. Eq. 321; *Zillmer v. Landguth*, 94 Wis. 607; *Conger v. Lowe*, 124 Ind. 368; *Mulvane v. Rude*, 146 Ind. 476; *Potter v. Couch*, 141 U. S. 296.

² *Mitchell v. Mitchell*, *supra*. See *Taylor v. Brown*, *supra*; *Mulvane v. Rude*, *supra*; *Bradley v. Carnes*, 94 Tenn. 27.

³ *Mulvane v. Rude*, 146 Ind. 476, 482, and cases cited; also cases *supra*.

⁴ *In re Elliot*, 1896, 2 Ch. 353.

his sons alone were to have the benefit, should be invested for his sons on their attaining majority, the sum to be applied by the trustees as they might think fit, this latter clause would be treated as repugnant to the benefit.¹

The like has been held true of language inconsistent with a clear gift of a life estate, or, indeed, of any other clearly defined interest.² Thus, where a distinctly expressed life estate is given, the fact that the testator has added a power of disposal of the fee-simple will not of itself enlarge the gift; it will merely add a power.³ It makes no difference, according to the general view, whether

Language inconsistent with gift of life estate: power of disposal added.

¹ In *re Johnston*, 1894, 3 Ch. 204, Stirling, J.: 'I have no doubt that the discretion was intended to be conferred by the testator for most excellent reasons . . . ; but it does seem to me that it is really an attempt by the testator to fetter the enjoyment by a person of a benefit to which he has become absolutely entitled under the will.' Fettering property after the legatee or devisee has reached majority, is similarly treated in England. *Harbin v. Masterman*, 1894, 2 Ch. 184, 188; *Weatherall v. Thornburgh*, 8 Ch. D. 261, 269, 270; *Gosling v. Gosling*, Johns. 265. In this connection certain cases of 'spendthrift trusts' so-called, may be noticed, merely to distinguish them as standing upon a footing of their own. In some States property may be given in trust for a person upon the footing that the property shall be exempt from claims of creditors of the cestui que trust, even though no provision is made that the estate shall cease or go over to another upon attempted alienation or upon the insolvency of the cestui que trust. *Broadway Bank v. Adams*, 133 Mass. 170; *Iasigi v. Shaw*, 167 Mass. 328; *Partidge v. Cavender*, 96 Mo. 452; and other cases. See *Van Osdel v. Champion*, 89 Wis. 661, 665; *Bigelow*, Fraud, ii. 222. The doctrine has been much and it seems justly criticised.

² *Stuart v. Walker*, 72 Maine, 145.

³ *Mulvane v. Rude*, 146 Ind. 476, 483; *Giles v. Little*, 104 U. S. 291; *Glover v. Stillson*, 56 Conn. 316; In *re Cashman*, 134 Ill. 88; *Jenkins v. Compton*, 123 Ind. 117; *Stuart v. Walker*, 72 Maine, 145; *Copeland v. Barron*, id. 206 *Chase v. Ladd*, 153 Mass. 126; *Kent v. Morrison*, id. 137; *Logue v. Bateman*, 43 N. J. Eq. 434; *Rhodes v. Shaw*, id. 430. See *Joslin v. Rhoades* 150 Mass. 301, 303. 'To be used

the estate is real or personal.¹ But many authorities, especially in regard to personalty (to which the doctrine would perhaps more easily apply), look upon the power of disposal, if broad enough, as raising the life estate to an absolute one, assuming that the language of the will is satisfied by such a construction.²

Accordingly it is laid down in many States that if a gift, in terms or by implication for life, is followed by an absolute power of disposal, in terms or by implication,³ in the legatee or devisee, to the use of the first taker, the power of disposal is deemed to coalesce with the life estate, the two together thus constituting an absolute interest.⁴ The result is, that any gift over, as of 'what remains' after the death of the life tenant, is void for repugnancy.⁵ This doctrine has been applied to a case in which there was a gift for life, without liability to account, with a gift over of what might remain, and a general power of disposal (for the benefit of the life tenant); the gift over accordingly being void.⁶

and enjoyed' by the life tenant adds nothing to the interest. In *re McDongall*, 141 N. Y. 21.

¹ *Logue v. Bateman*, *supra*.

² *Weed v. Knorr*, 77 Ga. 636; *Van Gorder v. Smith*, 99 Ind. 404 (personalty); *Kendall v. Kendall*, 36 N. J. Eq. 91 (personalty); *Gaven v. Allen*, 100 Mo. 293, and other cases *infra*.

³ *Meacham v. Graham*, 98 Tenn. 190.

⁴ *Mercur's Estate*, 152 Penn. St. 49; *Dillon v. Falloon*, 158 Penn. St. 468; *Farish v. Wayman*, 91 Va. 430; *Hovey v. Walbank*, 100 Cal. 192. See *Wolfer v. Hemmer*, 144 Ill. 554, where the estate devised was, by one clause, in terms a fee, with power of disposal. See *Hensler v. Senfert*, 52 N. J. Eq. 754, 757; *Benz v. Fabian*, 54 N. J. Eq. 615; *Hale v. Marsh*, 100 Mass. 468, 469. But in some States the first taker would take absolutely only when the gift to him was, not for life, but undefined in extent. *Benz v. Fabian*, *supra*; *Sillcocks v. Sillcocks* 50 N. J. Eq. 24, 26.

⁵ Same cases.

⁶ *Bolman v. Lohman*, 79 Ala. 63.

But it will often be found that the supposed 'absolute power' is not absolute; and if it is not, of course no absolute interest has been given.¹ It will probably be found that it is not full power, to be exercised in any mode or for any and every purpose, for the sole use and benefit of the life taker, even though one part of the language may purport to give 'full power' or 'absolute power' of sale. Indeed, though 'full' or 'absolute' power of disposal be given without qualification, still, as by the preceding language a definite life estate only was given, it is natural to infer that this is the paramount thought in the testator's mind; while the power of disposal, though called 'absolute,' is given only to enable the taker to enjoy more fully the benefit of the life estate, as, for instance, by changing its form at will.² A fortiori is this the case where the power amounts to nothing more than authority to dispose of the remainder as a separate interest.³

The result is that, except in cases in which a clear absolute power of disposal is given to the use of the first taker, the power will not raise the life estate to an absolute one, and any gift over, such as of 'what remains,'

¹ See *In re Proctor*, 95 Iowa, 172; *Chase v. Ladd*, 150 Mass. 126, 128; *Kent v. Morrison*, id. 137, 139; *Collins v. Wickwire*, 162 Mass. 143; *Bnrleigh v. Clough*, 52 N. H. 267; *Ramsdell v. Ramsdell*, 21 Maine, 288, 293; *Kent v. Armstrong*, 2 Halst. Ch. 637; *Benz v. Fabian*, 54 N. J. Eq. 615, 618, 619. See *Sillcocks v. Sillcocks*, 50 N. J. Eq. 24.

² Compare *Welsh v. Woodbury*, 144 Mass. 542. For that reason it would not be a case within the rule that of two inconsistent clauses the later shall prevail; though the gift might be enlarged where the power of disposal was given afterwards in an independent clause or in a codicil, so as plainly to show a change of mind. This would not be a case of repugnancy, but a new gift.

³ *Collins v. Wickwire*, 162 Mass. 143, 144. See *Baker v. Thompson*, id. 40.

is valid.¹ And in some States the gift of an interest, if *expressly* declared to be for life, will not be raised by coalescence or otherwise to an absolute interest by any mere power of disposal, however large; the added power of disposal being considered to be a separate and distinct gift, having no effect upon the life estate.² The first gift will not be treated as absolute in such States unless it was undefined.³ The rule in both of these particulars applies as well to gifts of personalty as to gifts of realty.⁴

The rule of repugnancy applies to cases in which an absolute gift in the first instance is followed by a direction that the devisee or legatee shall hold the property in trust for any purpose or to any extent; the trust must be disregarded. Thus the testator gave property to his wife 'absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so'; and the wife was held entitled to take free of any trust.⁵ Nor is the gift to a devisee or legatee 'free and unfettered' to be cut down by language otherwise of trust.⁶ Nor where, after a gift of real and personal estate in fee simple to younger sons, the testator adds: 'I assume that my eldest son will understand and

Repugnant trusts.

¹ A fortiori where the only ground for supposing such a power is inference from the fact that 'what remains' at the death of the life tenant is given to another. *Bramell v. Cole*, 136 Mo. 201, 212.

² *Mulvane v. Rude*, 146 Ind. 476, 483; *Evans v. Folks*, 135 Mo. 397; *Benz v. Fabian*, 54 N. J. Eq. 615, 618. Secus where the life estate is given, not expressly, but by implication. *Id.*; *Downey v. Borden*, 7 Vroom, 468. See *Wilson v. Wilson*, 46 N. J. Eq. 321.

³ *Benz v. Fabian*, *supra*; *Sillcocks v. Sillcocks*, 50 N. J. Eq. 24, 26, 27; *Evans v. Folks*, *supra*.

⁴ *Benz v. Fabian*, *supra*.

⁵ *In re Hutchinson*, 8 Ch. D. 540. See *Lambe v. Eames*, L. R. 6 Ch. 597.

⁶ *Giles v. Anslow*, 128 Ill. 187; *Meredith v. Heneage*, 1 Sim. 542.

appreciate my reasons for giving whatever property I may have at my decease to his younger brothers, and that they on their part will not fail to do for him and his family all in the circumstances the truest fraternal regard may require them to do.' This created no trust for the eldest son.

It is true that the words of supposed trust in the cases just stated would not now, by the better rule, be regarded as sufficient for the purpose,² but the result would be the same though the most apt and unmistakable words of trust were used. Trusts are never excepted from the rule of repugnancy.

Where the purpose of the gift is to benefit the donee alone, it is perhaps still more clear that an added 'trust' must be rejected. Thus a bequest to A of money, with which he is directed by the will to buy a farm for himself, or to start himself in business, is an absolute bequest. A may do as he likes with the money.³ The ground of this is, that the courts will not compel a person to do a thing which the next moment he may undo; if the donee is to buy a farm with the money, he may immediately sell the farm and so have the money absolutely.

The foregoing remarks may seem to conflict with the rule elsewhere laid down that the courts will diligently endeavor to ascertain the meaning of the testator, however unskillfully or ignorantly expressed. But the conflict is only seeming, for the rule, as fully expressed, is that the courts

Rule of repugnancy not a rule of intention.

¹ *Rose v. Porter*, 141 Mass. 309. See *Sturgis v. Paine*, 146 Mass. 354; *Davis v. Mailey*, 134 Mass. 588; *Wood v. Cox*, 2 Mylne & C. 684, reversing 1 Keen, 317; *Parnall v. Parnall*, 9 Ch. D. 97. But see *Ware (or Wace) v. Mallard*, 21 L. J. Ch. 355, criticised in *Jarman*, 360.

² *Ante*, p. 151.

³ *Rogers's Estate*, 179 Penn. St. 602. How strong the position of the donee in such cases is may be seen in a case like *Stokes v. Cheek*, 28 Beav. 620, or *In re Cameron*, 26 Ch. D. 19.

will permit the testator to have his way in the disposition of his property, provided, or in so far as it is consistent with law; and one of the rules of law, applicable alike to literate and illiterate, is that an added clause repugnant to a clear gift shall not affect the gift. This rule is not a rule of intention, at least not primarily; the question raised by it is simply whether there is a clear gift, and then whether there is language inconsistent with the same. This question settled, there is no inquiry what the testator intended — the rule of repugnancy is applied.

Another rule of frequent application in questions of uncertainty of subject is, that where an interest is given in clear and decisive language, that interest is not to be destroyed or cut down except by language as clear and decisive;¹ though it is not necessary in *trust* estates that the language should in express terms cut down the gift — inference, if clear and decisive, will be effectual.² But though the estate clearly given *may* be cut down, it cannot be done in the case of a clear gift in fee absolute, unless the plain intent is to cut down the estate as distinguished

¹ *Thornhill v. Hall*, 2 Clark & F. 22; *Webb v. Lines*, 57 Conn. 154; *Yost v. McKee*, 179 Penn. St. 381; *Heck's Estate*, 170 Penn. St. 232; *Bailey v. Sanger*, 108 Ind. 264; *Kimble v. White*, 50 N. J. Eq. 28; *Hoxsey v. Hoxsey*, 37 N. J. Eq. 21; *Benson v. Corbin*, 145 N. Y. 351, 359; *Washbon v. Cope*, 144 N. Y. 287, 297; *In re McClure*, 135 N. Y. 238, 243; *Freeman v. Coit*, 96 N. Y. 63; *Roseboom v. Roseboom*, 81 N. Y. 356; *Gaskins v. Hunton*, 92 Va. 528; *Collins v. Collins*, 40 Ohio St. 353; *Gillmer v. Daix*, 141 Penn. St. 505; *Judevine v. Judevine*, 61 Vt. 587. See *Langdale v. Briggs*, 8 DeG. M. & G. 391, 429; *Leslie v. Rothes*, 1894, 2 Ch. 499, 515.

² See *Doe v. Davies*, 1 Q. B. 430; *Poad v. Watson*, 6 El. & B. 606; *Collier v. Walters*, L. R. 17 Eq. 252; *In re Townsend*, 1895, 1 Ch. 716, 721; as to cutting down the fee in trustees.

from imposing restraint upon the use of the estate already well given.¹ That distinction should be clearly noticed.

On the other hand, where the estate or interest given is not clearly defined by the testator, there is a case for construction. Thus, in a case of a devise to a man and his heirs, if still the language does not expressly or by plain implication make it a fee simple absolute, by giving a legally absolute power of disposal to the devisee in fee, a limitation over, by way of executory devise, will be good. That is, the fee will be treated as falling short of being absolute, and the limitation over thus saved from the rule of repugnancy.² Or the fee simple may be followed by language converting the gift, so far beneficial, into a trust,³ or otherwise cutting it down.⁴ That would be true though clear language of an absolute gift were first used.⁵ This, however, is only saying that the testator has the right to give any estate he can; it is a very different thing from saying that, having given a clear

¹ *Bellas's Estate*, 176 Penn. St. 122, 130; *Good v. Fichthorn*, 144 Penn. St. 287. See *Hoxsey v. Hoxsey*, *supra*; *Sherburne v. Sischo*, 143 Mass. 437; *Wead v. Gray*, 78 Mo. 59.

² *Howard v. Carusi*, 109 U. S. 725, 730; *In re McClure*, 136 N. Y. 238, 243; *McClellan v. Larchar*, 45 F. J. Eq. 17; *Shalters v. Ladd*, 141 Penn. St. 505. See also *Copeland v. Barron*, 72 Maine, 206; *Wellford v. Snyder*, 137 U. S. 521; *Wicker v. Ray*, 118 Ill. 472.

³ See *Giles v. Anslow*, 128 Ill. 187; *Rose v. Porter*, 141 Mass. 309; *Hoxsey v. Hoxsey*, 37 N. J. Eq. 21.

⁴ See, e. g., *In re Pinhorne*, 1894, 2 Ch. 276, Chitty, J.: 'Following the most technical method of construction, I say that the proviso and the declaration cut down the apparent absolute interest, as given in the first instance.'

⁵ A gift to trustees and their heirs is only *prima facie* a gift to them in fee, and the presumption may be overturned merely by implication, as where the devise to them is for purposes to last only for a certain time; in such a case the devise will be cut down accordingly. *Collier v. Walters*, Law Rep. 17 Eq. 252; *Doe v. Davies*, 1 Q. B. 430; *In re Townsend*, 1895, 1 Ch. 716, 721.

estate, he can take from the devisee or legatee the benefit, in whole or in part, which belongs to it.

The rule permitting an executory devise in the case just stated calls for a remark. A gift to a man and his heirs forever, to repeat the rule, may be followed by an executory devise; while, if a gift of 'what remains' at the death of the devisee in fee follows, that will be void.¹ The explanation appears to be, that the executory devise constitutes part of the description of the estate given to the first taker, thus preventing that estate from being, what naturally it is, absolute; while in the second case there is nothing in the description to prevent it from being absolute — hence it *is* absolute, and the added words of 'what remains' are therefore repugnant to the gift and void.

It is laid down, in the midst of considerable conflict of authority, that the doctrine of repugnancy has no application to gifts which fail, as by the death unmarried of a legatee or devisee in the lifetime of the testator. The doctrine, it is declared, does not come into operation until somebody takes, and it is only those limitations which defeat the interest some one takes that are void, on the ground that they are inconsistent with what is given to him.² Thus a testator makes a gift of personalty to A in tail (which is in law an absolute gift) with remainder to B. The first legatee dies unmarried in the lifetime of the testator, and the gift to him fails accordingly;³ the second legatee survives the testator. It is held that B is entitled

¹ *Joslin v. Rhoades*, 150 Mass. 301.

² *Lindley, L. J.*, in *In re Lowman*, 1895, 2 Ch. 348, 358.

³ See chapter xxvii.

to the gift, and not the residuary legatee upon the footing that the gift to A lapsed.¹ The principle was, that where there are successive limitations of personal estate in favor of several persons absolutely, the first of them who survives the testator takes absolutely, although he would take nothing if any other legatee had survived and taken; in other words, the failure of the earlier gift is to accelerate, and not to destroy, the later gift.²

Thus far of repugnancy. Certain other rules or doctrines relating to certainty of subject will now be considered.

CERTAINTY OF SUBJECT CONTINUED: VARIOUS CASES.

We have spoken of mistake as a matter of either object or subject alike. Some further remarks may now be made in regard to the same thing in its relation only to the *subject* of disposition, taking for particular consideration mistake in the will in the designation of property.

Mistake in designation of property: similar property.

A kind of mistake of subject, of not infrequent occurrence, is where a testator makes a specific gift of personal property, having no such property, but having other property to which the description would perfectly apply but for the misnomer, especially where the misnomer is itself in part a correct name for the property. The will is deemed to relate to the similar property which

¹ In re Lowman, *supra*; Mackinnon v. Peach, 2 Keen, 555; Donn v. Penny, 1 Mer. 20; Brown v. Higgs, 4 Ves. 708. Contra, Harris v. Davis, 1 Colly. 416; Hughes v. Ellis, 20 Beav. 193; and other cases.

² Lindley, L. J., *ut supra*. This doctrine conforms more to the testator's intention, and accordingly appears preferable to the contrary.

the testator has. A testatrix owning debenture stock in the Grand Trunk Railway of Canada, but having no shares therein, gave to a certain person her 'shares in the Great *Western* Trunk Railway of Canada.' There was no railway of that name, but there had been a Great Western Railway of Canada, which some eleven years before the will was made had been taken over and united with the Grand Trunk Railway of Canada. Here, then, was a double mistake, assuming that the testatrix meant her debenture stock; but still it was held that that stock passed.¹

The gift of an indefinite amount, part, or share, must in accordance with what has already been said be declared void, unless the will furnishes the means of ascertaining the sum intended. The whole will should be examined, if necessary, to remove the doubt. Thus a gift to A of a 'reasonable' sum of money, without any indication to what the word reasonable relates, would be void; while if it were a gift of a reasonable sum to remunerate the legatee for certain services or for his trouble in a certain matter, it would

¹ In re Weeding, 1896, 2 Ch. 364, North, J.: 'The will thus expressed clearly shows an intention to pass something. . . . I quite agree that if the testatrix had had any shares in one of the companies, debenture stock of that company could not pass, because there would have been something properly described by the gift, and there would have been no reason for giving any extension to the meaning of the words. But here words are used which do not accurately describe anything which the testatrix ever had. No doubt she intended to pass something, and there is nothing except this debenture stock on which the gift can operate.' See In re Bodwin, 1891, 3 Ch. 135; In re Nottage, 1895, 2 Ch. 657. Compare the like mistake of subject. In re Fish, 1894, 2 Ch. 83.

A testator may by a residuary clause dispose of property which he mistakenly supposes that he has already disposed of by the will or otherwise. In re Bagot, 1893, 3 Ch. 348.

be good, the court simply inquiring what would be reasonable in such a case.¹

In like manner a gift of 'part' of a larger quantity would be void for uncertainty; but if the 'part' be definite the gift will be good though the interest be composed of specific parts and no direction is given in the will which of such parts are given. The legatee or devisee in such a case has the right, it is held, to elect the part he will take. Thus in a devise of two acres out of four lying together, the devisee may select any two acres he prefers.² So a devise of two out of three houses owned by the testator in a particular place gives the devisee the right to choose any two.³ But a devise of Whiteaere, when the testator has two estates of that name, does not, perhaps, give the devisee an election; on the contrary, the devise is void unless the ambiguity is removed by competent evidence.⁴

With reference to the last example, however, it would not be safe to draw any broad inference. Thus it would not be safe to say that a gift of funds invested in what

¹ *Jackson v. Hamilton*, 3 Jones & L. 702.

² *Marshall's Case*, Dyer, 281, note; *Jarman*, 331.

³ *Tapley v. Eagleton*, 12 Ch. D. 683.

⁴ *Richardson v. Watson*, 4 Barn. & Ad. 798. But some doubt was cast upon this case in *Asten v. Astens*, 1894, 3 Ch. 260, 263, Romer, J., in regard to the application of the principle to the particular facts of the case. The principle, which was supported, was thus stated by Mr. Justice Romer: 'If a will shows that a testator intends to give a particular property to a legatee, and, owing to the testator having several properties answering the description in the will of the particular property given, you are unable to say, either from the will itself or from extrinsic evidence, which of the several properties the testator referred to, then on principle the gift must fail for uncertainty.' See also *Duckmanton v. Duckmanton*, 5 Hurl. & N. 219; *Tapley v. Eagleton*, 12 Ch. D. 683.

is described as 'a Swedish mortgage' must be void for uncertainty if it appears that the testator had more than one such mortgage. It has been held in such a case that all the testator's Swedish mortgages passed.¹ But that view was helped by the context.

In some cases the gift of 'part' may amount to a gift of the whole, for that may be the reasonable interpretation of the gift. Thus, where a testator gave permission to his wife 'to appropriate absolutely to herself such parts' of his plate as she desired, the gift was held to convey to the wife the right to take the whole of the testator's plate.² But where *selection* appears to have been intended, there can be no taking of the whole.³

Another rule relating to certainty in the subject of gift is, that where the gift is of a general or indefinite nature, so as to give occasion for construction, the addition of a general power of disposal is to be treated as indicating that the testator meant to give the property absolutely.⁴ Hence any gift over of 'what remains' will be void.

Another rule deserving of mention is this: If the language of gift is doubtful, the law leans to a construction which will distribute the estate as conformably to the general rules of inheritance as possible consistently with the testator's lan-

¹ Richards v. Patteson, 15 Sim. 501. See also Sampson v. Sampson, L. R. 8 Eq. 479.

² Arthur v. Mackinnon, 11 Ch. D. 385.

³ Kennedy v. Kennedy, 10 Hare, 438. Further see Davis v. Davis, 1 Hem. & M. 255; Reid v. Reid, 30 Beav. 389.

⁴ State v. Smith, 52 Conn. 557; Henderson v. Blackburn, 104 Ill. 227; Logue v. Bateman, 43 N. J. Eq. 434; Rhodes v. Shaw, id. 430; Benz v. Fabian, 54 N. J. Eq. 1; ante, p. 232.

guage.¹ Still the courts will endeavor to sustain the gift, and if there is doubt whether a valid gift has been made, they will seek so to construe the will as to make the gift good.

A further rule is, that in case a clause in a will is obscure or ambiguous, words which manifest an intention to dispose of the whole estate of the testator are to be treated as favoring the ^{Passing of fee} favored.
construction which will pass a fee.² And where a will contains no limitation over after a gift of the kind, that fact is to be weighed in support of the construction mentioned.³

Ambiguity in the amount of a gift is a not uncommon instance of uncertainty of subject. Such a case is met by a rule that the will should be so construed as to give the greatest benefit to the legatee or devisee. Thus a gift of a sum 'not exceeding' £100 will be construed as giving the legatee £100; and gift of '£50 or £100,' will be construed in the same way.⁴ A bequest will not be declared void for uncertainty merely because the amount is differently stated in different parts of the will, if it appears upon the whole that one of the statements was a mistake.⁵

¹ Francis Estate, 75 Penn. St. 220; Smith's Appeal, 23 Penn. St. 9.

² Huber's Appeal, 80 Penn. St. 348; Geyer v. Wentzel, 68 Penn. St. 84.

³ Huber's Appeal, *supra*.

⁴ Compare *Oddie v. Brown*, 4 DeG. & J. 179, gift of '£3000 or thereabouts' to be raised by accumulation of annual income, sustained, though a last dividend might raise the gift slightly above the sum named. Bruce, L. J., dissented.

⁵ *Phillips v. Chamberlaine*, 4 Ves. 50; *Jarman*, 329.

CHAPTER XIX.

SECONDARY CONSTRUCTION: CLAUSES.

VESTED AND CONTINGENT INTERESTS.

A TESTATOR may bestow upon his devisee or legatee a vested or a contingent interest. When is the interest vested, when is it contingent? The answer Definitions. appears to be, that an interest is vested, as distinguished from contingent,¹ either when enjoyment of it is presently conferred, or when, if enjoyment is postponed, the time of enjoyment will certainly come to pass. In other words, an estate is vested when there is an immediate right of present enjoyment or a present fixed right of future enjoyment.² If the *right* of enjoyment is made to depend upon some event or condition which may or may not happen, or be performed, or if, the case of a gift to take effect in future, it cannot be ascertained in the meantime whether there will be any one to take the gift, the interest is contingent.³

The following are illustrations: A testator devises a farm to A for life, and after A's death to Illustrations: B in fee. B's interest, though postponed in gifts at majority, or to the wife of a future pastor. enjoyment of the res itself, is vested, because the time of enjoyment is certain to

¹ The term 'vested' is sometimes used in a broader sense, in which it is not contrasted necessarily with 'contingent.' Thus we say that a certain person has large vested interests in some railway; we mean that he has large property interests in the railway, or much money *invested* in it. The word is used in other senses also. See *Taylor v. Frobisher*, 5 DeG. & S. 191; *Armstrong v. Wilkinson*, 3 App. Cas. 355.

² Kent, iv. 202.

³ *Fairfax's Appeal*, 103 Penn. St. 166; *Winslow v. Goodwin*, 7 Met. 363; *Farnam v. Farnam*, 53 Conn. 261; Kent, iv. 206.

come to pass. But suppose that the testator devises the farm to A *in case* he shall attain twenty-one years of age (without any gift over). Now A's interest is contingent, because the right of enjoyment of it is made to depend upon an event which may or may not happen. Or suppose that the testator devises the farm to A for life, but in case he dies under twenty-one then over to B. B's interest is contingent for the same reason. Or, again, suppose that the testator devises the farm to A for life, and after his death to the wife of such person as may then be the pastor of the first church in the town of B. The ulterior interest will be contingent because it cannot be ascertained during the life estate of A whether there will be any one who can take the gift.

Another and not uncommon illustration may be seen where a testator gives real or personal estate to A, and in case of his death to B. Now as the death of A is certain to happen, the testator, by using the words of contingency '*in case of his death,*' must refer to some other event — some event which is uncertain — unless the language of the will indicates a different intention. Accordingly the construction applied to such a gift is that the 'death' referred to is death in the lifetime of the testator or before the period of distribution or payment, according as the gift is immediate or to take place in futuro.¹ The whole clause must be examined to see which of the two points of time is to be taken, but in either case the gift is contingent.

¹ Jarman, 1564, 1569; Jackson's Estate, 179 Penn. St. 77, 83; Lovass v. Olson, 92 Wis. 616; In re Baer, 147 N. Y. 348, 354; In re Denton, 137 N. Y. 428; Dawson v. Schaefer, 52 N. J. Eq. 341, 344; Brown v. Lippincott, 49 N. J. Eq. 44, 46; Crane v. Bolles, id. 373, 381; Britton v. Thornton, 112 U. S. 526; Jones v. Beers, 57 Conn. 295; Crossman v. Field, 119 Mass. 170; Burton v. Conigland, 82 N. C. 99; Ewing v. Winters, 34 W. Va. 23.

The significance of this distinction between vested and

Significance of distinction: vesting preferred. contingent interests may be seen in such facts as that contingent estates are within the rule against perpetuities, and that they are not descendible, even in virtue of statute, where the existence of the devisee or legatee makes part of the contingency,¹ and hence are subject to lapse.² Now the courts are unwilling to declare that a gift made by a testator must fail, or even be in suspense,³ and hence they have laid down the rule that the vesting of estates is to be favored, in other words, that an estate will not be declared contingent unless the language of the will requires;⁴ and to make that rule efficient they have adopted certain rules of construction for cases of uncertain language; some of them having relation to devises, others to legacies.

DEVISES.

One of these rules of construction is that where a testator has created a particular estate, and then has gone on to dispose of the ulterior interest expressly in an event which will determine the prior estate, the words descriptive of such event, occurring in the ulterior gift, will, if reasonably

¹ Winslow *v.* Goodwin, 7 Met. 363.

² See chapter xxvii.

³ Upon a kindred point it is laid down, that whether or not a testator can effectually cause a vested gift to be divested before it has actually reached the hands of the legatee, an intention to do so ought not to be attributed where the words are not clear. 'And in cases where the words are susceptible of such an interpretation, the court has held that the period over which the operation of a divesting clause of this kind is to extend ought not to be held to continue beyond that at which the legacy is de jure receivable. The courts in such cases favor early vesting.' In re Sampson, 1896, 1 Ch. 630, 635, Stirling, J.

⁴ Hale *v.* Hobson, 167 Mass. 397, 400; Knowlton *v.* Sanderson, 141 Mass. 323; Marsh *v.* Hoyt, 161 Mass. 459; Peck *v.* Carlton, 154 Mass.

possible, be construed as referring merely to the time of the determination of the possession or enjoyment under the prior gift, rather than as intended to postpone the vesting.¹

Accordingly where a *remainder* is limited 'in default' or 'for want' of the object or objects of the preceding limitation, this is construed to mean, *upon* the failure or determination of the prior estate, rather than, by taking the words literally, in *case* of the failure of the same. The ulterior estate thereby becomes vested, to take effect in enjoyment directly upon the termination of the prior estate. A testator devised lands to the first and other sons of A successively, and 'in default' of such sons, to A's daughters. The gift to the daughters is a vested devise in remainder, supposing that A has a son or sons; if A should have no sons, of course the daughters would take, by the very terms of the gift.²

A similar result is seen in cases in which a testator has given to A a clear estate, as for life, and then afterwards, in grafting a remainder upon this estate, has used words which appear to make the gift in remainder dependent upon the prior gift's taking effect. Here, too, the construction adopted is to treat the words in question

Gift for life,
remainder ap-
parently de-
pendent accord-
ingly.

231, 233; *Gingrich v. Gingrich*, 146 Ind. 227, 229; *Stokes v. Weston*, 142 N. Y. 433; *Bowditch v. Ayrault*, 138 N. Y. 222; *Nelson v. Russell*, 135 N. Y. 137; *Kimble v. White*, 50 N. J. Eq. 28; *Crews v. Hatcher*, 91 Va. 378, 381; *Chapman v. Chapinan*, 90 Va. 409, 411; *Woodman v. Woodman*, 89 Maine, 128.

¹ *Sellers v. Reed*, 88 Va. 377; *Jarman*, 756. The Court of Chancery has always opposed 'the postponement of vesting or possession, or the imposition of restrictions on the enjoyment of an absolute vested interest.' Lord Davey, in *Wharton v. Masterman*, 1895, A. C. 186, 198.

² *Doe v. Dacre*, 1 Bos. & P. 250; s. c. 8 T. R. 112. Such words as 'from and after' in a gift of remainder following a life estate do not indicate any intention to make the remainder contingent. *Nelson v. Russell*, 135 N. Y. 137, 140. See *infra*.

merely as descriptive of the state of things when the remainder is supposed by the testator to take effect, and not as making the remainder contingent. A testator gave lands, after the death of his wife, to his son, and then provided that if his three daughters, or either of them, should overlive their mother and brother, they were to have the same lands for life, with remainder to others. It was held that this remainder was vested, not contingent upon the death of the mother and brother; the words merely referred to the commencement of the remainder.¹ In another case a testatrix bequeathed a fund in trust for her sisters and their children; after the deaths of her sisters and their children, the interest of the fund was to be paid to A for life, and from and after A's death, 'in case he should become entitled to such interest,' then to certain cousins. It was held, as before, that the gift to the cousins was vested, and not contingent upon the event of A's becoming entitled to the interest.²

The whole subject has been summed up from the bench, in substance, as follows: The true way of testing such limitations as these is to raise the question, Can the words which in form import contingency be read as equivalent to 'subject to the interests previously limited?' Take the simplest case; a limitation to A for life, remainder to B for life, and upon the

Test in such cases.

¹ Webb v. Hearing, Croke Jac. 415.

² Pearsall v. Simpson, 15 Ves. 29. Sir Wm. Grant, M. R.: 'It was doubtful whether A would live to become entitled [he did not] to the interest. The testatrix, giving the capital over after his death, recollects that he may not live to take the interest; but if he does, she makes his death the period at which the cousins are to take. It is not a condition precedent, but fixing the period at which the legatees over shall take, if he ever takes.' See also Franks v. Price, 3 Beav. 182; s. c. 5 Bing. N. C. 37.

death of B, if A be dead, then to C in fee. The limitation to C is apparently made contingent on A's dying in B's lifetime. Still, as the condition of A's death is an event essential to the determination of the interest before limited to him, the gift is to be read as if it were to A for life, remainder to B for life, and on B's death, *subject* to A's life interest, if any, to C in fee. But to apply this principle, the condition upon which the limitation over is made dependent must involve nothing except what is essential to the determination of the interests before limited. For instance, if the limitation be to A for life, remainder to B for life, 'and if, at the death of B, A shall have died under the age of twenty-one,' or 'without children,' then to C in fee, here, in either case, room is left for contingency. The condition of A's dying in the first case under twenty-one, and in the second without children, is an event which may or may not have happened when the life estates in A and B are determined; and until it has happened, the limitation over is contingent, not in appearance merely, but actually. To such cases the principle would not apply.¹ Nor would the rule apply in any case against the intention shown by the will.²

A similar construction is applied to cases in which a gift over, apparently cutting down, in words of contingency, a prior devise, stands in opposition, not to the prior devise, but to the event of the devisee's coming into possession of the estate. The prior estate is not cut down. A testator

Gift over not in opposition to prior devise.

¹ Sir W. P. Page, V. C., in *Maddison v. Chapman*, 4 Kay & J. 719. So a devise to A when he reaches twenty-one, with gift over if he does not reach that age, without reference to issue, and no provision for the devisee during minority, is contingent upon A's attaining majority. *Sager v. Galloway*, 113 Penn. St. 500.

² *Bowditch v. Ayrault*, 138 N. Y. 222.

devised the residue of his estate, real and personal, to his son A in fee simple. He then provided that the whole estate, real and personal, should remain in the hands of his executors and be managed for the benefit of A until he should attain majority, and that out of it A should receive an education and support until his majority, and then added: 'but if my said son A should die leaving no children, then' the estate should go over to others. It was held that the gift to A was not cut down by the clause quoted, but that A took absolutely. 'The devise over stands not in opposition to the original devise, but to the event of the devisee's coming into possession.' In other words, the case is as if the devise ran thus: 'I give the residue of my real and personal estate to my son A, his heirs and assigns forever. I direct my executors to rent the real estate and to keep the proceeds thereof, together with the personalty, invested for the benefit of my son A until he becomes twenty-one years of age. And my will is, that upon his attaining twenty-one, my son shall come into possession of all his estate, real and personal, but if he die without children, then it shall go over.'¹

If, however, the ulterior estate is to arise upon a contingent determination of the prior interest, and the prior gift does, in fact, take effect, but is determined in a way different from that expressed by the testator, the ulterior gift is contingent and fails.² Thus a testator devised lands to A for life, remainder to A's sons, upon condition that A and his issue male should take a particular name; if he or

¹ *Van Houten v. Pennington*, 4 Halst. Ch. 272, 745; *Dawson v. Schaefer*, 52 N. J. Eq. 341, 345; *Patterson v. Madden*, 54 N. J. Eq. 714, 721, 722. See to the same effect, *Wurts v. Page*, 4 C. E. Green, 365.

² *Frey v. Thompson*, 66 Ala. 287.

they refused, the gift was to be void, and the lands go over according to further disposition made. A survived the testator, complied with the condition, and then died without issue. It was held that the limitation over did not take effect.¹

Gifts to a widow and 'if she shall marry' then to another, furnish another illustration of the favoring of vested interests. For such cases, to save the ulterior gift, it is laid down that that gift shall be regarded as intended to take effect upon the marriage of the widow, and not as being dependent upon the marriage. A testator devised to his wife for life, 'if she should not marry again, but if she should' then that his son A should presently, after his mother's marriage, have the premises. The widow having died without remarrying, it was held that the son took a vested estate.²

Gifts to widow,
but over on
marriage.

The widow therefore in such cases takes an estate during widowhood, and the gifts over take effect as vested remainders. It may, however, appear that the testator actually intended that the ulterior estate should be dependent upon, and not begin with, the remarriage of the widow. If such was the plain meaning, the courts cannot help it.³ The distinction has been stated thus: Where the not marrying again is interwoven into the original gift, the testator, having thus created an estate during widowhood, must generally be considered, in

¹ *Amherst v. Donelly*, 8 Vin. Abr. 221, pl. 21; 5 Bro. Parl. Cas. Toml. 554.

² *Luxford v. Cheeke*, 3 Lev. 125. So where the prior gift is to a young woman until she marries, or to A until he becomes bankrupt, then over. *Eaton v. Hewitt*, 2 Dru. & S. 184 (marriage); *Etches v. Etches*, 3 Dru. 441 (bankruptcy).

³ See *Frey v. Thompson*, 66 Ala. 287; *Meeds v. Wood*, 19 Beav. 215; *Underhill v. Roden*, 2 Ch. D. 494.

referring afterwards to the marriage, to describe the determination of that estate by *any* means, and hence the gift over is a vested remainder expectant thereon.¹ But where the testator first gives a clear estate for life, and then grafts thereon a devise over to take effect on the marriage of such devisee for life, the devise over is not to take effect unless the contingency happens.²

Another of the rules of construction laid down in aid of the principle that the vesting of estates should be preferred is seen in certain cases in which the Prior gift on its face contingent. *prior* gift is on its face contingent. Cases of gift to A if or when he attains, for instance, twenty-one, followed by an ulterior gift to another in case A should not reach the age named, furnish an example. In these cases the construction adopted is that the prior gift to A is by the gift over merely explained in nature, and not to be considered as contingent on A's living to attain twenty-one;³ though, as we have seen, the contrary would be true if the gift were simply to A if or when he shall attain twenty-one⁴ without further provision.⁵

¹ *Browne v. Hammond*, Johns. 210, 213; *Pile v. Salter*, 5 Sim. 411; *Meeds v. Wood*, *supra*.

² *Jarman*, 760.

³ *Boraston's Case*, 3 Coke, 16, 19; *Doe v. Ewart*, 7 Ad. & E. 636; *Doe v. Moore*, 14 East, 601; *Doe v. Nowell*, 1 Maule & S. 327; s. c. 5 Dow, 202. See *Roome v. Phillips*, 24 N. Y. 465; *Livingston v. Greene*, 52 N. Y. 118; s. c. 6 Lans. 50; *Engles's Estate*, 167 Penn. St. 463, 465; *Cowdin v. Perry*, 11 Pick. 503, 508; *In re Collier*, 40 Mo. 287; *Meyer v. Eisler*, 29 Md. 32. It makes no difference in the construction whether any disposition is or is not made of the interest before A reaches the age named. *Doe v. Moore*, *supra*.

⁴ See *Dawson v. Schaefer*, 52 N. J. Eq. 341, 347.

⁵ *Kingman v. Harmon*, 131 Ill. 171. Compare *Gibbens v. Gibbens*, 140 Mass. 102, as to the word 'then,' after a gift to a class.

The gift over in these cases is considered as explanatory of the

The same rule applies where the gift is to a class of persons. A testator devised lands to A for life, and on his death to his children equally at the age of twenty-one, as tenants in common; but if only one child live to attain twenty-one, to him or her at twenty-one; and if A died without issue, or such issue died under twenty-one, then over. It was held that the children took vested remainders.¹

The event on which the prior gift appears to be made contingent may be associated with some other event without affecting the application of the rule. A testator gave lands to certain persons for life, and at their death or the death of the one who lived longest, to A if he lived to attain twenty-one; in case he died under twenty-one, and his brother B should survive him, then over. It was held that A took a vested interest.²

It seems, too, that the event upon which the estate goes over need not be the attaining any given age; if it be surviving the person who has the prior estate, the rule will apply. A testator devised to his wife for life with remainder in part to his brother for life, and from and after the wife's death, subject to the brother's interest in the part, to A in fee if living at the death of the wife, but if A should die before the wife without leaving issue, then over. A, it was held, took a vested remainder.³

sense in which the testator intended that the interest of the devisee or legatee should depend on his attaining the specified age, namely, that at that age the interest should become absolute. Jarman, 767.

¹ Doe v. Nowell, 1 Maule & S. 327; s. c. 5 Dow, 202.

² Bromfield v. Crowder, 1 Bos. & P. N. R. 313; 14 East, 604.

³ Finch v. Lane, L. R. 10 Eq. 501.

This part of the subject may be concluded with a remark which, in part, fell from the bench, that there is a long category of cases from early times down to the present, in which such words as 'if,' 'when,' 'as soon as,' &c. as 'if,' 'when,' 'as soon as,' and a fortiori such as 'after' and 'from and after,'¹ prima facie importing contingency,² have been held from the context not to import contingency in the sense of a condition precedent to vesting, but to introduce a proviso or condition subsequent, operating as a defeasance of an estate vested.³ The authorities, in a word, clearly show that a remainder is not to be construed as contingent merely because the language of the testator literally or strictly taken makes it contingent, where the nature of the limitations affords ground to believe that the testator's language was not used with a view to suspend the vesting.⁴ Still the favor shown to vested interests is never to be pressed so far as to defeat the intention of the testator;⁵ there is no restraint upon the power of a testator to create contingent estates. Not even the fact that an absurd consequence follows will deter the courts from declaring that the testator intended to create and has created a contingent estate.⁶

LEGACIES.

It remains to consider the rules for construing legacies given in futuro, for there are rules more or less peculiar to legacies. The subject, however, begins with the doctrine which we have seen running through devises; the law favors the vesting of the

¹ *Nelson v. Russell*, 135 N. Y. 137, 140.

² *Perrine v. Newell*, 49 N. J. Eq. 57, 60.

³ *Andrew v. Andrew*, 1 Ch. D. 410, James, L. J. The remark generally applies to legacies as well as to devises.

⁴ *Jarman*, 773. See *Dawson v. Schaefer*, 52 N. J. Eq. 341, 344.

⁵ *Richardson v. Wheatland*, 7 Met. 171.

⁶ *Holmes v. Cradock*, 3 Ves. 317.

gift, and will not declare the legacy, any more than a devise, contingent, unless the language of the will requires.¹ Accordingly, as in the case of devises, language of apparent contingency will easily give way to indications that the testator did not use it with a view to real contingency. But if futurity is, on the whole, of the substance of the gift, the vesting is suspended in the meantime.²

The first in point of importance of the indications of the kind is where the suspension of enjoyment of the gift is fixed only as a matter of the time of payment, and not made substance of the gift or for reasons personal to the legatee;³ in other words, where there is a gift *and* a direction to pay in the future.⁴ Such cases have naturally led to the rule

Postponement
of time of pay-
ment merely.

¹ *Foster v. Holland*, 56 Ala. 474, 480.

² *Smith v. Edwards*, 88 N. Y. 103; *Miller v. Gilbert*, 144 N. Y. 68, 73; *In re Young*, 145 N. Y. 535, 538; *Sellers v. Reed*, 88 Va. 377. See *Cook v. McDowell*, 52 N. J. Eq. 351, 353; *Haggerty v. Hockenberry*, id. 354, 359; *Tindall v. Miller*, 143 Ind. 337, 339.

³ *Garland v. Smiley*, 51 N. J. Eq. 198, 202; *Engles's Estate*, 167 Penn. St. 463, 464.

⁴ *Sellers v. Reed*, 88 Va. 377; *Farnam v. Farnam*, 53 Conn. 261; *In re Seebeck*, 140 N. Y. 241, 248. See *Dawson v. Schaefer*, 52 N. J. Eq. 341, 344.

Sometimes a testator declares his intention that the gift shall be postponed in enjoyment for a stated time after the legatee acquires full title to it, notwithstanding he is then of age. The English courts appear to deal summarily with such cases. 'The principle of this court,' said Wood, V. C., in *Gosling v. Gosling, Johns.*, at p. 272, quoted as settled, but apparently not with approval, in *Wharton v. Masterman*, 1895, A. C. 186, 192, by Herschell, L. C., 'has always been to recognize the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age; unless during the interval the property is given for the benefit of another. If the

of construction that, in the absence of other evidence, the gift, notwithstanding the use of words of apparent contingency, should be treated as vested and not contingent.¹ Hence the gift will not fail by the death of the legatee before the time or event. A testator gave stock to trustees to pay a stated sum of money per annum to his daughter for life, and after her death 'to pay, assign, and transfer the sum of £1000 stock equally' amongst all the children of his daughter, 'to be paid and transferred to them when and so soon as the youngest should attain his or her age of twenty-one years;' after his daughter's death the dividends to be applied to maintain the children. The children took vested interests in the stock; hence the death of some of them, before the youngest became twenty-one, did not defeat the gift to them.²

Words directing division or distribution between several persons at a future time amount to a direction to pay, and hence fall within the same rule.³

Division between several persons.

Thus a legacy to A and B of £10,000 in particular bonds, with the dividends arising therefrom, to be equally divided between them when the youngest reaches twenty-five, vests the stock at once in the legatees.⁴ Payment in the future in such cases is

property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one.'

¹ *Wardwell v. Hale*, 161 Mass. 396; *Eldridge v. Eldridge*, 9 Cush. 516, 519; *Adams v. Woolman*, 50 N. J. Eq. 516, 520; *Cook v. McDowell*, 52 N. J. Eq. 351. Of course it does not affect the question of vesting that after-born children are let in, to share with those in being at the event named. *Haggerty v. Hockenberry*, 52 N. J. Eq. 354.

² *Chaffers v. Abell*, 3 Jur. 577.

³ See *In re Seebeck*, 140 N. Y. 241, 248; *In re Tienken*, 131 N. Y. 391; *Haggerty v. Hockenberry*, 52 N. J. 351.

⁴ *May v. Wood*, 3 Bro. C. C. 471.

not because of anything personal to the legatees, but that they may reach maturity before taking *possession* of what belongs to them.¹

Obviously it can make no difference how the time of payment or distribution is set, provided that otherwise there is a clear gift of an immediate interest. Thus it does not make a gift of money contingent that there is added the provision that the money is not to be paid over until the testator's debts are paid, or until certain of his land is sold, or until certain other legacies are paid.

It will have been noticed that the construction which looks upon the suspension of payment or distribution as not importing contingency, speaks of gifts *and* postponement of payment or distribution. The conjunctive relation, in cases such as we have been speaking of, appears to be necessary; a gift to a person in case of his reaching a certain age, or of the happening of some event, or in any other language which plainly imports contingency, will not, if that is all, be treated as vested; and it seems equally true that, if the gift itself consists only in a direction to pay upon the apparent contingency, the contingency, so far, is real, and must be so treated by the courts. In other words, in this last-named class of cases time is of the substance of the gift, and not a mere matter of postponement of enjoyment.²

Gift 'and' postponement of payment: time essential when.

¹ Haggerty v. Hockenberry, 52 N. J. Eq. 354, 359; Adams v. Woolman, 50 N. J. Eq. 516, 521.

² See Peckham v. Gregory, 4 Hare, 398; Adams v. Woolman, 50 N. J. Eq. 516, 520. In the cases just cited the doctrine is stated thus: 'If there is a gift to a person at twenty-one, or on the happening of any event, or a direction to pay and divide when a person attains twenty-one, there the gift being to persons answering a particular description, if a party cannot bring himself within it, he is not entitled to take the benefit of the gift. There is no gift in those cases

and personal property to trustees in trust, to pay, apply and transfer the same, upon a future event named, to the brothers and sisters of A, share and share alike, 'upon his, her, or their attaining twenty-five' or marrying with consent in the case of the sisters. Meantime the trustees were authorized to apply the rents and profits of the property for the maintenance of the brothers and sisters. It was held that the gift was contingent, not postponed merely in enjoyment.¹

Still this limitation must not be taken too strongly. At most it is only of *prima facie* effect, and will readily yield to evidence of an intention that the gift is not to be taken as contingent. If from the language of the will it appear that payment or distribution has been postponed, not for reasons personal to the legatee, but for convenience

Postponement
for convenience
of fund.

except in the direction to pay or in the direction to pay and divide. But if, upon the whole will, it appears that the future gift is only postponed to let in some other interest, or, as the court has commonly expressed it, for the benefit of the estate, the same reasoning has never been applied to the case. The interest is vested notwithstanding, although the enjoyment is postponed.' To the same effect, *Post v. Herbert*, 12 C. E. Green, 540, in which it is said that a gift to A 'at' a given age or marriage, or 'when' or 'from and after' his attaining a given age, is *prima facie* contingent. *Perrine v. Newell*, 49 N. J. Eq. 57, 60.

¹ *Leake v. Robinson*, 2 Mer. 363. See *Walker v. Mower*, 16 Beav. 365; *Gardiner v. Slater*, 25 Beav. 509; *Locke v. Lamb*, L. R. 4 Eq. 372; *In re Wintle*, 1896, 2 Ch. 711.

Where there is no gift and no language importing gift except in the direction to pay, or to convert the property into money, and then make distribution, the vesting is postponed, because time is annexed to the substance of the gift. *In re Young*, 145 N. Y. 535, 538; *Delaney v. McCormack*, 88 N. Y. 174; *Lippincott v. Pancoast*, 47 N. J. Eq. 21, 25. But this rule will yield to evidence of a different intention. *In re Young*, *supra*; *Miller v. Gilbert*, 144 N. Y. 73; *Smith v. Edwards*, 88 N. Y. 105; *Lippincott v. Pancoast*, *supra*.

touching the fund in question, especially where there is a prior vested disposition of it, the gift will not be treated as contingent merely because there is a simple direction to pay in futuro as distinguished from a gift *and* a direction so to pay.¹ A testator provided an annuity for A and B for ten years after his own and his wife's death; in case of the death of either A or B, the annuity to go to the survivor; after the ten years he gave to A, if then living, a sum of money, but to B, if A were then dead. A and B both survived the testator, but both died within the ten years. It was held that the gift to them vested; the words of contingency had been used only to provide for the situation between A and B, and not to make the gift itself conditional. The postponement was for the convenience of the estate, and not personal to A and B.²

The prior gift in such cases affords ground for considering that the testator's idea was that the person to take thereafter in the apparent contingency was to take simply after the prior gift; the language of contingency being the language of a person unskilled in formal statement of intention. Such a case might even be made where there was a gift over if the legatee should die before the time of payment or distribution.³

¹ See *Cook v. McDowell*, 52 N. J. Eq. 351, 353; *Haggerty v. Hockenberry*, id. 354, 359; *Garland v. Smiley*, 51 N. J. Eq. 198, 202; *Heilman v. Heilman*, 129 Ind. 59.

² *Bromley v. Wright*, 7 Hare, 334. See *Dawson v. Schaefer*, 52 N. J. Eq. 341, 344; *Haggerty v. Hockenberry*, id. 354, 359. The decision in *Beck v. Burn*, 7 Beav. 192, and in one or two other cases, apparently contra, has been doubted. *Parker v. Sowerby*, 17 Jur. 752; *Adams v. Roberts*, 25 Beav. 658; *Jarman*, 800, note.

³ *Shrimpton v. Shrimpton*, 31 Beav. 425. Further see *In re Duke*, 16 Ch. D. 112.

Another strong indication in these cases of apparent contingency, that the testator did not in reality intend that the legacy should be contingent, has been found where the will has provided that interest shall be paid to the legatee until the legacy itself becomes payable; and a rule of construction has accordingly been laid down.¹ But here again the indication may be overturned by the language of the will; a testator might direct that a sum of money should be paid to A in event only of his attaining a stated age, but that meantime the interest arising from it should be paid to or for him. The gift of the principal sum would be contingent in such a case.

The language just used shows that it is not necessary, however, that the interim payments should be made *to* the legatee, to indicate that he has a vested interest in the principal also; it may be directed to be paid over to another, for instance, his guardian or trustee, for his use in general or for his maintenance. Interest to be paid as maintenance is still interest, so as to raise a presumptive title to the principal. It would be otherwise of maintenance as maintenance, out of and less than the interest.² Maintenance *being* the interest, that is, where

¹ Fuller v. Winthrop, 3 Allen, 51, 60; Toms v. Williams, 41 Mich. 552, 565; Rogers v. Rogers, 11 R. I. 38; Dale v. White, 33 Conn. 294; In re Wintle, 1896, 2 Ch. 711; Watson v. Hayes, 5 Mylne & C. 125. 'It is well known,' said Lord Cottenham, in Watson v. Hayes, 'that a legacy which would, upon the terms of the gift, be contingent upon the legatee attaining a certain age, may become vested by a gift of the interest in the meantime, whether direct or in the form of maintenance, provided it be of the whole interest.' See In re Wintle, *supra*, quoting this language.

² Pulsford v. Hunter, 3 Bro. C. C. 416; Leake v. Robinson, 3 Mer. 363, 381, 384. See also In re Parker, 16 Ch. D. 44; In re Mervin, 1891, 3 Ch. 197; that a *discretionary* trust to apply for maintenance the whole interest, or as much as may be thought fit, is not equivalent to a direction to pay interest, but only a gift of so much as is required for maintenance.

it is in fact the very interest of the fund, would be the same thing as a designation of interest in terms.¹

Apart from statute, legacies charged upon land, and made payable at a future day, form an exception to the general rule concerning gifts *and* postponement of enjoyment. Such legacies are not vested, unless the contrary intention be shown; and hence they lapse if the legatee die before the time of payment arrives.² This broad rule was adopted in opposition to the rule in regard to legacies payable out of the personal estate, which are considered vested. The reason of this distinction has been said to be the favor shown by the English courts, apparently meaning courts of equity, towards the heir. It has accordingly been intimated that the rule has not been extended in *equity* to cases in which the estate was given to a stranger upon express condition that he pay the legacy charged upon the land.³ But both these suggestions have been denied, and the true reason affirmed to be, that courts of equity govern themselves, as far as is

Legacies charged on land and payable in futuro not vested.

¹ *Watson v. Hayes*, 1 Mylne & C. 125, 133; ante, p. 260, note. In *re Parker*, supra, Jessel, M. R., held that the case was not different where there was a direction to pay the whole interest for maintenance, to which was superadded a direction that the whole or such part of the interest as should be thought fit should be paid, citing his own ruling in *Fox v. Fox*, L. R. 19 Eq. 286. But as to these two cases of the late Master of the Rolls, see *In re Wintle*, 1896, 2 Ch. 711, 713, where trustees were empowered to apply 'the whole or such part as they shall think fit' of the income of presumptive shares, for maintenance during minority, the shares themselves being otherwise contingent. It was held that the words did not show that they were vested before majority of the legatees.

² *Birdsall v. Hewlett*, 1 Paige, 32; *Marsh v. Wheeler*, 2 Edw. Ch. 163; *Harris v. Fly*, 7 Paige, 421; *Sweet v. Chase*, 2 Comst. 73; *Spence v. Robbins*, 6 Gill & J. 507; *Garland v. Smiley*, 51 N. J. Eq. 198.

³ *Birdsall v. Hewlett*, 1 Paige, 32. See *Garland v. Smiley*, supra.

consistent with equity, by the rules of the common law, of which the rule in question is one, and that the common law rule has always been adhered to in equity.¹ In other words, the rule above stated, in regard to legacies charged upon land, is a rule both of law and of equity.

RESIDUARY BEQUEST.

It remains to make a remark concerning words of apparent contingency in residuary gifts. It is supposed that a very clear intention must be shown to prevent a residuary gift from vesting, because intestacy may be the consequence of holding the gift to be contingent.² That could not be the case with contingent gifts in the prior parts of the will, if the will contained, as it generally contains, a residuary clause, for as we have seen the residuary clause would itself prevent intestacy in respect of dispositions of the will which failed. But how much stress should be placed upon the fact that the contingent words occur in a residuary gift cannot be stated. Perhaps all that can be said is that added stress should be laid upon the case because of that fact.³

This chapter now leads naturally to conditions generally.

¹ Lord Hardwicke, in *Prowse v. Abingdon*, 1 Atk. 482, 486; *Garland v. Smiley*.

² *Jarman*, 809.

³ For cases in which the fact has been noticed see *Booth v. Booth*, 4 Ves. 399; *Jones v. Mackilwain*, 1 Russ. 220; *Eldridge v. Eldridge*, 9 Cush. 516.

CHAPTER XX.

SECONDARY CONSTRUCTION: CLAUSES.

CONDITIONS.

A THING is made dependent upon a condition when it is made dependent upon an uncertain event, Definition and remarks. act, or omission.

The event, act, or omission may be past, present, or future. In a sense a thing present or past cannot be uncertain; such a thing is a fact, and hence has or has not taken place, or exists or does not exist; but whether it has taken place or now exists may not be known, and a thing is uncertain within the meaning of the definition if, though present or past, knowledge of the fact is unknown to the person who creates the condition.¹

The event, act, or omission may be made dependent upon or performable by the person who creates the condition, or another. In the case of a will the testator may declare that a gift in the will shall be made only upon his own doing or omitting some particular act. Such a provision would not amount to a reservation of a right to alter or revoke the will by parol.²

¹ Language in the form of a condition will be construed as a covenant against a devisee of land charged with legacies where no right of entry or forfeiture is provided for non-compliance. *Cunningham v. Parker*, 146 N. Y. 29, 33; ante, p. 94.

² *Langdon v. Astor*, 16 N. Y. 9, 26.

The event, act, or omission may be made dependent upon or performable by the devisee or legatee, as for instance that he shall have been in the testator's employ a certain length of time to entitle him to a gift.¹ But as a will has no legal force until after the testator's death, it is thought to be doubtful whether there can be a valid condition, requiring performance of acts by the devisee or legatee in the testator's lifetime, such as the support of the testator, unless the devisee or legatee has notice of the condition in season.²

It seems clear, however, that a gift might properly be made upon agreement with the donee for the performance of certain acts during the lifetime of the testator, and that failure to perform the agreement might disentitle the donee to the gift.³ So, too, if a condition of similar import were brought by the testator to the notice of the donee, it would seem that the condition would be valid. But as such a condition would be unusual, it would devolve upon the party seeking to take advantage of it to prove the notice.⁴

Doubt not infrequently arises whether language used amounts to a condition. The question is one of intention, and a case for construction accordingly is presented. Certain phases of this subject were under consideration in the preceding chapter; and there we found the doctrine, plainly expressed, that the law looks with disfavor upon condi-

¹ In re Sharland, 1896, 1 Ch. 517.

² Colwell v. Alger, 5 Gray, 67; note by the present writer, in Jarman, 842.

³ Burleyson v. Whitley, 97 N. C. 295. See Lefler v. Rowland, Phil. Eq. 143; Martin v. Martin, 131 Mass. 547.

⁴ Colwell v. Alger, supra.

tions attached to gifts. But that was between gifts which are conditional and gifts which are vested, and it would be unsafe to argue from that doctrine that the law looks generally with disfavor upon conditions, so as to be anxious to find that the testator did not intend to annex any condition to his bounty unless he has said so in unmistakable words.

Consider, for instance, cases in which a testator has made a gift to one of his executors, by designation of the office, as 'to my executor A.' Does this language import that the testator intended <sup>Gifts to execu-
tors.</sup> that the gift should be conditional upon A's accepting the office of executor? If the language of the authorities under consideration in the preceding chapter is to be taken as indicating a general principle, the answer would probably be in the negative. For the provision, even in its literal terms, is not conditional, and hence would be well within the doctrine of the preceding chapter. Indeed it has been plainly laid down that where an estate has been clearly given it is not possible to treat as a condition words which are capable of being interpreted as mere description of what must occur before the estate in question can arise.¹ That looks much like a reference to the language of the courts in cases of contingent as distinguished from vested gifts.

But the authorities appear to be generally opposed to such extension of the doctrine of the preceding chapter, or, if the view is a distinct and independent one, to the proposition itself that description cannot be taken to import condition. While there is other authority than that just cited, to the effect that a gift by a testator to one of his executors by designation of the office cannot

¹ *Edgeworth v. Edgeworth*, L. R. 4 H. L. 35, 41, Lord Westbury.

be treated as conditional upon acceptance,¹ there is more authority for the doctrine that a legacy to an executor, by the name of executor, is *prima facie* a gift to him as executor, so as to be conditional upon his accepting the place.² The same would be true of a legacy to one of the trustees in a trust created by the will, under the designation of trustee.³

Slight indications, however, would be enough to change the construction. Thus if the gift contain expressions indicating that the testator's motive in making it was one of respect, admiration, or affection, and not to provide a reward for trouble in administering the estate, the idea of a condition would be overturned.⁴ The same would be true if the executor-legatee, being a relative, were described by his degree of relationship to the testator, as 'I give to my cousin A £50, whom I appoint joint executor.'⁵ And clearly there can be no condition in the case of a gift to a person under designation of an office or post, that he

Construction in such cases easily changed.

¹ *In re Denby*, 3 DeG. F. & J. 350. See *Lewis v. Matthews*, L. R. 8 Eq. 277; *Slaney v. Watney*, L. R. 2 Eq. 418; *Morris v. Kent*, 2 Edw. 174; that if the gift was to the executor 'for his trouble,' it would be conditional upon acceptance of the office.

² *Calvert v. Sebbon*, 4 Beav. 222; *Hawkins's Trust*, 33 Beav. 570; *Angermann v. Ford*, 29 Beav. 349; *In re Reeve's Trusts*, 4 Ch. D. 841; *Lewis v. Matthews*, *supra*; *Jervis v. Lawrence*, L. R. 8 Eq. 345; *Kirkland v. Narramore*, 105 Mass. 31; *Rothmaler v. Cohen*, 4 Desaus. 215; *Billingslea v. Moore*, 14 Ga. 370.

³ *Kirkland v. Narramore*, *supra*. But the language in this case clearly showed that the gift was conditional.

⁴ *Cockerell v. Barber*, 2 Russ. 585; *Bubb v. Yelverton*, L. R. 13 Eq. 131.

⁵ *Dix v. Reed*, 1 Sim. & S. 237. Other parts of the will may furnish similar indications. Such is the case where the will directs that the gift to the executor shall be paid at once. *Humberston v. Humberston*, 1 P. Wms. 332. So where a legacy is given to him in remainder expectant upon the determination of a life interest. *Wildes*

shall assume the same, if it does not appear that the testator is interested in having the legatee assume it, for there would be no motive for the condition.

Upon the question whether the testator intended that his whole will should be conditional, as where he begins 'In case of my sudden and unexpected death, I give,' &c., the authorities appear ^{The whole will conditional.} to look with disfavor upon a construction which would prevent the will from taking effect. In such cases it is said that the will should not be construed as conditional unless it is clear that the testator intended that the will should take effect or continue only in a certain event.¹ If by reasonable interpretation the language can be regarded as meaning that the testator referred to the contingent event as the reason merely for making the will, the will is not conditional.²

This doctrine, while in most of the authorities laid down only of the whole will, has also been considered applicable equally to the case of a particular one of several gifts in a will, as for ^{Particular part conditional.} instance to a residuary bequest introduced by words that might as well have been used at the beginning of the will. Thus 'In case of a sudden and unexpected death, I give the remainder of my property to' A, has been construed as not conditional.³

v. Davies, 1 Smale & G. 575. So where the gift is of residue or a share of residue. *Griffiths v. Pruett*, 11 Sim. 202; *Christian v. Devreux*, 12 Sim. 264.

¹ *Skipwith v. Cabell*, 19 Gratt. 758, 782. See *Brown v. Concord*, 33 N. H. 285.

² *Id.*; *In re Porter*, L. R. 2 P. & D. 22, 24; *In re Dobson*, L. R. 1 P. & D. 88; *In re Martin*, *id.* 380.

³ *Skipwith v. Cabell*, *supra*. See further *Jarman*, 842, note by the present writer.

Conditions are, technically speaking, either precedent or subsequent. A condition is precedent when the happening of some uncertain event, or doing some act, is necessary to the creation of the interest dependent upon it; a condition is subsequent when an interest already created may be defeated or determined thereafter by the happening of some uncertain event, or doing or omitting some act, such as the support of the devisee's mother during her life.¹ Whether a condition is precedent or subsequent, however, is to be determined by the language of the particular instrument; if there be any uncertainty in the language, the case is one for construction. What rules of construction, if any, are applicable to such cases?

There is no distinction in the way of technical words by which to answer the question; that is, there is no set of words which the law has prescribed or found necessary even presumptively to constitute the one or the other kind of condition. The distinction turns upon the proper meaning of the language used in the particular case, and may be found in the most inartificial or unusual language. The same words may make a condition precedent or subsequent, according to the nature of the thing and the intention;² and accordingly what would be a condition precedent in a deed may be a condition subsequent in a will.³ The general distinction however is this: If performance of the condition is required before the vesting of the gift, the condition is precedent; while if the gift is to vest before the time fixed for performance of the condition, it is subsequent.⁴

¹ *Gingrich v. Gingrich*, 146 Ind. 227, 230; *Hoss v. Hoss*, 140 Ind. 551.

² *Acherly v. Vernon*, Willes, 153; *Birmingham v. Lesan*, 77 Maine, 494; *Merrill v. Wisconsin College*, 74 Wis. 415.

³ *Casey v. Casey*, 55 Vt. 518; *McCall v. McCall*, 161 Penn. St. 412, 414.

⁴ *McCall v. McCall*, 161 Penn. St. 412, 414.

The question in every case for construction of the kind is, What was the intention? If the language shows the intention to be that the interest is to arise by virtue of the instrument itself, taking effect at once as a vested interest, whether in present or future enjoyment of the res, it is precedent; if not, the condition, if any, is subsequent.¹ It is only putting the case another way to say that if the condition can be performed at any time before the interest is to come into existence, it is precedent; while if performance may be afterwards it is subsequent. A testator devised to A an annuity as a rent-charge, to be paid semi-annually out of the rents of his real estate; by codicil he declared that the gift was to be taken by A in satisfaction of all claims upon his real or personal estate, and upon condition that A released all claim thereto to his executors. The condition was held precedent; it could not be said that the devisee could not perform the condition before the time of the annuity, for as payment was to be made semi-annually, A would have six months after the testator's death in which to comply.²

It has been laid down as the result of the authorities that the argument in favor of construing the condition as precedent is stronger where a gross sum of money is to be raised out of land than where there is a devise of the land itself; Facts in favor of precedence of condition. where a pecuniary legacy is given, than a residue; where the nature of the interest is such as to allow time for the performance of the act before enjoyment of the res begins, than where it is not; where the condition is capable of being performed at once, than where time is required for performance.³ While on the other hand the

¹ A contingent estate may be subject to a condition subsequent. *Egerton v. Brownlow*, 4 H. L. Cas. 1.

² *Acherly v. Vernon*, Willes, 153. ³ *Tappan's Appeal*, 52 Conn. 412.

fact that a definite time has been set for performance, but none for the vesting of the estate, favors the view that the condition is subsequent.¹ It should further be said that, inasmuch as the failure of a condition subsequent defeats the estate or interest subject to it, the condition itself is strictly construed; it must be so expressed as to leave no doubt of the precise contingency provided for; it must be such that the courts can see from the beginning, precisely and distinctly, upon the happening of what event the vested estate is to end.²

Whether a condition be construed as precedent or as subsequent may be a very serious matter. This is no-

Effect of distinction.

where more strikingly seen than in the fact

(1) that equity cannot interfere to relieve from the consequence of a failure to perform a condition precedent,³ — while nothing is more common than for the court, acting upon motives of conscience and justice, to grant relief when the unperformed condition is subsequent; and in the fact (2) that not even the consent of the testator himself, who has imposed the precedent condition, can dispense with it, without remodelling the devise or legacy, that is, without a testamentary act, while the contrary is true of a condition subsequent.⁴ A testator devised to A upon condition that she should marry B, otherwise over. A, with consent of the tes-

¹ Jarman, 847 (for the whole paragraph); *Duddy v. Gresham*, 2 L. R. Ir. 442 (for the last point).

² Jarman, 853; *Duddy v. Gresham*, supra (at p. 471); *Egerton v. Brownlow*, 7 H. L. Cas. 721. See *Illinois Land Co. v. Bonner*, 75 Ill. 315.

³ Kent, iv. 125.

⁴ *Davis v. Angel*, 31 Beav. 223, 226, Sir John Romilly, M. R.; affirmed on appeal, 4 DeG. F. & J. 524, Lord Westbury.

tator, married C. It was held that the condition, being precedent, was not dispensed with.¹

¹ *Davis v. Angel*, *supra*. Lord Westbury thought the case would probably be different where a testator, contemplating an event after his death, should merely give certain directions concerning, for instance, the marriage of A, and then A should marry in the testator's lifetime with his consent.

CHAPTER XXI.

SECONDARY CONSTRUCTION: CLAUSES.

FROM WHAT TIME A WILL SPEAKS.

A WILL creates rights only upon the death of the testator, but in order to determine the nature and extent of the rights created it is sometimes necessary to look back to the state of things which existed when the testator was writing, or when he executed, his will, sometimes to look forward to, or rather to await, facts after his death. Accordingly, a will may, in regard to the disposition of property,¹ speak (1) from its date, (2) from the time it was executed, (3) from the

¹ *Gray v. Hattersley*, 50 N. J. Eq. 206. In this case the court had occasion to say: 'The rule that a will, for some purposes, speaks from its date, and for other purposes from the death of the testator, applies only to the ascertainment of the property which passes by it. It relates to the effect and operation of the instrument rather than to its construction. It has no application to a case where the meaning of language is involved.' This possibly is misleading. It often happens that a question of the meaning of the language of a will is the very question to be determined, in deciding whether a will passes after-acquired property, that is, whether the will speaks from its date or from its execution. See e. g. *Winchester v. Forster*, 3 Cush. 366. But in *Gray v. Hattersley* the language of the testator was declared to be 'clear'; hence construction had no place there. See ante, p. 149. What the court in that case meant appears to be, that the point of time to be regarded for construing a will is not itself a matter of construction; it must be of the making of the will. What a man's language means must be decided of the time when he uses it; a man cannot be considered to mean something at his death that he did not mean when he expressed himself.

death of the testator, (4) from some later time. It is seldom however that the first of these points of time has to be regarded, for in almost all cases the first is coincident with the second, or so nearly coincident as not to be separable from it. The difference between the second and third points of time may be the difference of years, and involve great changes, so that whether the one or the other is taken as the point of view may be a matter of serious importance. How, then, is it to be determined whether the will speaks from the one or the other point of time? Are there any rules to meet the point?

In regard to *personalty*, the following may be taken as a general answer: If that which is given (called the 'subject' of the gift) is *specific*, the will speaks As to person-
alty. from its date; if the gift is not specific, the will speaks from the testator's death. This assumes, in either case, that there is no expressed intention in the will, or at least none at variance with the answer; for 'expressum facit tacere tacitum.'

The answer, or rule, just stated is based upon the theory that where a testator makes a specific gift, as for example of 'my seal ring,' he is con- Theory of the
answer. sidered as having in contemplation only the particular thing then in his possession, and not also, as an alternative, something else at his death to take its place if that particular thing is gone; not even something else which may answer to the description of the thing given.¹ The theory indeed appears to be a stringent one, for the rule of law goes to the extent of declaring that though the subject of gift, in the possession of the testator, remain unchanged, still if his own interest

¹ See *Cockran v. Cockran*, 14 Sim. 248; *Pattison v. Pattison*, 1 Mylne & K. 12.

therein, at the time of his death, be not the interest he had when he executed the will, the property will not pass, unless the will show an intention to pass it. Thus where a testator bequeaths his interest in a lease, he bequeaths the interest he had when he made the will, not an interest he may have acquired afterwards, as by taking a renewal of the lease upon its termination. The renewal interest is as different in law from the one named in the will as if it had been something altogether different.¹

In regard to gifts of *realty*, we have elsewhere seen that, except as the case has been changed by statute, a testator could not devise his after-acquired lands, however strongly he might express his intention to do so. The devise could speak only from the date of the will. Where, however, the testator disposed of his real and personal property generally, the two principles operated together. The testator was still supposed to give the same to the full extent of his capacity; and accordingly, while his lands passed only as of the date of the will, his goods passed as of the time of his death.²

Legislation however has generally changed the iron-bound rule of the common law in regard to wills of *realty*, so as to make it merely a question of intention whether after-acquired lands pass or not. The statutes differ somewhat. In some of the States, as in Pennsylvania, such lands pass by devise unless a contrary intention appears in the will; in some

¹ Jarman, 289.

² Jarman, 290. In *Banks v. Thornton*, 11 Hare, 176, a gift of 'all the residue of my property which consists of stock' passed all the stock the testator owned at his death.

of the States, as in New York, an intention to pass after-acquired lands is considered to be found, presumptively but not conclusively, by a devise of all the testator's real estate; and in other States, as in Massachusetts, a clear and manifest intention to pass such lands must appear in the will.¹

A change of circumstances in the *persons* to whom the testator gives property (called the 'objects' of the gift) may raise the same sort of question; does the will speak from its date or from the testator's death? The general answer is, that Change of circumstances in objects. it speaks from its date, upon the presumption that the testator had in mind only those who then met the case.

This is an obvious interpretation of the will where the objects are mentioned by name or where they are otherwise specifically designated; the case is like that of the subject of gift specifically described. The fact that some other person answers to the description of one who no longer exists will not entitle him to the gift; that person, it is supposed, was not in the mind of the testator at all. Thus if the testator's legatee is John, and John dies, the fact that the legatee's father afterwards has another son whom he names John will not enable that John to take the legacy.² So a gift to the wife of A

¹ The following are a few of the many cases: *Commonwealth v. Hackett*, 102 Penn. St. 505; *Byrnes v. Baer*, 86 N. Y. 210; *Winchester v. Forster*, 3 Cush. 366, 369; *Hill v. Bacon*, 106 Mass. 578; *Morey v. Sohler*, 63 N. H. 507; *Flummerfelt v. Flummerfelt*, 51 N. J. Eq. 432; *Gardner v. Gardner*, 37 N. J. Eq. 487; *Phillipsburgh v. Bruch*, id. 482; *McGavock v. Pugsley*, 12 Heisk. 689; *Henderson v. Ryan*, 27 Texas, 673; *Thorndike v. Reynolds*, 22 Gratt. 21; *Patty v. Goolsby*, 51 Ark. 61; *Missionary Soc. v. Mead*, 131 Ill. 338; *Briggs v. Briggs*, 69 Iowa, 617; *Gibbon v. Gibbon*, 40 Ga. 562; *Gold v. Judson*, 21 Conn. 623.

² Of course it makes no difference whether the legacy is specific or not; the object, John, is specific. Nor does it matter whether the gift is of personalty or of realty.

would be a gift to the wife A had at the date of the will, not to a subsequent wife.¹ Indeed, one who *was* the wife of A at the date of the will would take though A should die and his widow remarry, for she in *person* was presumptively intended by the will.² The same rule applies to a gift to the testator's own wife.³

But the rule in regard to *objects* of gift — which considers only those to be within the intention of the testator who meet the case at the date of the will — is not limited, as in the rule in regard to the *subject* of gift, to those who are specifically designated; it applies as well to objects generally designated, unless such objects are persons naturally within the bounty or provision of the testator. Thus a gift to the testator's servants is a gift to those only who were his servants at the date of his will, unless a different intention is shown. Such servants will take, in exclusion of servants of a later time down to the testator's death, though they (the servants of the date of the will) have since left the testator's service.⁴ But it will be otherwise if the testator designate the legatees as those who shall be in his service at the time of his death; servants discharged before that time, though wrongfully discharged, will not take.⁵

¹ Van Syckel v. Van Syckel, 51 N. J. Eq. 194 (explaining Swallow v. Swallow, 12 C. E. Green, 278); Garratt v. Niblock, 1 Russ. & M. 629; Franks v. Brooker, 27 Beav. 635; Boreham v. Bignall, 8 Hare, 131; Firth v. Fielder, 22 Week. R. 622, Jessel, M. R., denying In re Lynne, L. R. 8 Eq. 65.

² Jarman, 303.

³ Garratt v. Niblock, *supra*; Van Syckel v. Van Syckel, *supra*.

⁴ Parker v. Marchant, 1 Yonng & C. C. C. 290. But see Jones v. Henley, 2 Ch. Rep. 162; In re Marcus, Week, N. 1887, 168.

⁵ Darlow v. Edwardes, 1 Hurl. & C. 547; In re Serre, 10 Week. R. 751; In re Hartley, 26 Week. R. 590; In re Benyon, Week. N. 1884,

All this of course may be made explicit by an expressed intention on the face of the will, as for instance where the testator speaks of the subject or the object of his bounty in the present tense or ^{Use of present tense.} by the use of the word 'now' or some such expression. Hence for such cases the courts declare that wherever the testator has referred to an actually existing state of things, whether property or the persons to take it, he is considered as referring to the date of his will and not to the time of his death.¹

There appears however to be some limitation to this doctrine; as has already been intimated, the courts are not disposed to apply it, where to do so would result in cutting off persons naturally ^{Construction not to cut off objects.} within the testator's bounty. The courts are not disposed to narrow, but rather, within reason and natural intent, to enlarge the scope of the testator's language at least in the case of gifts to children. Thus an immediate gift to children simpliciter, without name or description, is treated as meaning the children in existence at the death of the testator, if there be any at that time.² In like manner a gift to the 'heirs' or 'heirs-at-law' of the testator will be treated as referring to those who are legally such, that is, at the death of the testator, unless a different intention is manifested in the

157. As to who are servants within the meaning of the text, see Jarman, 305, note.

¹ Gold *v.* Judson, 21 Conn. 616; Everett *v.* Carr, 59 Maine, 325, 332; Morse *v.* Mason, 11 Allen, 36; Quinn *v.* Hardenbrook, 54 N. Y. 83; Board of Education *v.* Ladd, 26 Ohio St. 210; Anshutz *v.* Miller, 81 Penn. St. 212.

² Shotts *v.* Poe, 47 Md. 513; Benson *v.* Wright, 4 Md. Ch. 278. But this rule might also cut off the representatives of children deceased in the testator's lifetime, apart from statute, as where the gift was to the testator's *own* sons or daughters.

will.¹ Nor will the use of the word 'then' as introductory to the gift over after the death of the legatee or tenant for life prevent this result, unless it is clear that the word was so used as plainly to indicate that the heirs or next of kin living at the death of the life tenant or legatee were meant.²

But this limitation will, as has just been intimated, itself yield to the expression of a purpose at variance with it. Thus where it clearly appears that the testator meant his heirs or next of kin at the death of a tenant for life, the intention will prevail.³

Akin to the foregoing are cases in which since the making of the will and before the testator's death there has been some alteration of the law which, if applicable to the will, would affect the will itself or the dispositions made by it. Is the will in such a case to be regarded from its date or from the death of the testator? The answer depends upon circumstances. The validity of the execution of the will is to be determined by the law in force at the testator's death.⁴ A statute changing the requirements of execution is not open to the objection that it operates retrospectively, because the execution of the will has no force until the death of the testator. Again, if a statute should alter the effect of the dispositions made in the will, and the testator should allow the will to stand unchanged, it would be presumed, in England, that it was his intention that the will should operate

¹ *Wood v. Bullard*, 151 Mass. 324; *Whall v. Converse*, 146 Mass. 345; *Minot v. Tappan*, 122 Mass. 535; *Buzby's Appeal*, 61 Penn. St. 111.

² *Wood v. Bullard*, and *Minot v. Tappan*, *supra*.

³ *Buzby's Appeal*, *supra*.

⁴ *Packer v. Packer*, 179 Penn. St. 580; *Lane's Appeal*, 57 Conn. 182; *Jones v. Robinson*, 17 Ohio St. 171.

according to the change in the law.¹ But in some of our States it is held that, in regard to questions of property, the law which was in force when the will was executed is to be applied.² Both views, no doubt, stand upon the ground of supposed intention in the testator. The testator — so runs the argument — naturally gave with regard to the existing law when he wrote his will, but if he left his will unchanged after a change in the law, did he not also intend to dispose of his property accordingly? Yes, if he knew of the change. As a matter of fact, actual intention in the matter probably plays a small part in most cases.

A further question of a similar nature may arise where a devise is made to A for life, remainder to B, and a change in the law is made after the testator's death which may affect the gift to B. In such a case the question whether the law should prevail as it existed at the death of the testator or at the death of A will depend upon the further question whether the estate given to B is vested or contingent. If B's estate vested at the death of the testator, no subsequent change in the law could take away any of B's rights therein; if it remained contingent until the death of A, the law as it then stood would govern unless a different intention appear in the will.³

¹ *Haslneck v. Pedley*, L. R. 19 Eq. 271.

² *Taylor v. Mitchell*, 57 Penn. St. 209; *Gable v. Daub*, 40 Penn. St. 217. See also *Hargroves v. Redd*, 43 Ga. 142; *In re Elcock*, 4 McCord, 39; *Lawrence v. Hebbard*, 1 Bradf. 252.

³ *Vantilburgh v. Hollinshead*, 14 N. J. Eq. 32.

CHAPTER XXII.

SECONDARY CONSTRUCTION: CLAUSES.

WHEN MEMBERS OF A CLASS TAKE.

A QUESTION may arise in regard to the point of time for determining those who compose the members of a class of devisees or legatees. The will now may speak from some point of time after the testator's death. Thus the testator has given property to the heirs, issue, or children of A, without designating the point of time for determining who are such heirs, issue, or children. It may not be possible to determine at the testator's death who are to take as 'heirs' within the meaning of the will. Construction has to supply the omission, if it can.

Take first the case suggested, of an independent devise to heirs or issue as children; at what point of time should the members of the class be determined? One of the rules of construction bearing upon the question is that estates shall be construed to vest at the earliest possible moment consistent with the language of the will.¹ An immediate devise to the testator's heir or issue (his children) vests of course at the testator's death,² and we have elsewhere seen that the mere creation of a prior limited estate in a third person makes no difference.

¹ Jarman, 931.

² *Peck v. Carlton*, 154 Mass. 231, 233; *Fargo v. Miller*, 150 Mass. 225, 229.

In accordance with the rule of vesting just stated, an executory gift to the heir of another person vests as soon as there is a person who answers that description, that is, at the death of the person named. And though the gift is postponed till the determination of a limited estate given to a third person, still the death of the propositus, as the ancestor is called, is the time for ascertaining the person who is the devisee. Thus a testator bequeathed goods to A for life, remainder to the heir of B. B died in A's lifetime, and the question was, whether the person to take the remainder was the one who was B's heir at his death or the one who was heir at the death of A. Upon the rule of construction just mentioned, it was held that the time of B's death was the period.¹

This doctrine is applied as well to legacies as to devises. It is a general rule of construction that a future and contingent devise or bequest to a class takes effect on the happening of the contingency upon which the gift depends, only in favor of those objects who at that time come within the description.² And the rule is deemed so salutary that it is not to be departed from unless there is clear indication in the will that the testator had a different intention. It is not enough, for instance, that the heir has an express estate in the same property limited to him in another part of the will. A testator devised land to trustees in trust for the maintenance of his son A, who was his heir apparent, for life, remainder to his other sons successively in tail, with remainders over to

The doctrine applies to legacies also.

¹ *Danvers v. Clarendon*, 1 Vern. 35. See *Crane v. Bolles*, 49 N. J. Eq. 373, 382, of gifts to issue, original and in substitution for the parents, *infra*.

² *In re Allen*, 151 N. Y. 243, 247, *Andrews, C. J.*

others and their issue, with an ultimate remainder to the testator's right heirs. Power also was given to the trustees to make a provision for any wife of A and for his children. The intermediate remainders failed, and A now claimed the fee, and prevailed; there was no sufficient indication of a different intention to prevent the estate vesting in the heir at the testator's death.¹

The period at which gifts to descendants, relations, or next of kin, are to take effect is also a subject of frequent controversy; the question being whether the persons who happen to answer the description at the testator's death or those to whom it applies at some later period, are intended. Where the gift is not to the next of kin of a person who outlives the testator, the doubt is met by a rule of *prima facie* effect that those answering the description at the testator's death are intended.² In the case of a gift to the testator's own next of kin, there can be no doubt that his next of kin at his death are meant.³ But suppose the gift is to the next of kin of another person then deceased, as for instance the testator's wife. For solving the doubt in such cases the following rule of construction has been adopted: A gift to the next of kin of a person who is dead at the date of the will must, unless a different intention is manifested, receive an interpretation analogous to that adopted in the case of a gift to the testator's own next of kin in regard to the period for ascertaining who are intended; hence those who at the

¹ *Boydell v. Golightly*, 14 Sim. 327.

² *Moss v. Dunlop*, Johns. 490; *Wharton v. Barker*, 4 Kay & J. 483; *Dove v. Torr*, 128 Mass. 38; *Thompson v. Ludington*, 104 Mass. 193.

³ *Fargo v. Miller*, 150 Mass. 225, 229.

testator's death answer the description will take, unless a different intention is shown.¹

If the gift is to the next of kin of a person who survives the testator, the period at which it is determined who are to take is, if no intention to the contrary appear, the death of that person; next of kin being taken in the statutory sense, which imports the death of him to whom they are next of kin. The same would be true, it seems, if the gift were to the 'relations' of a person so outliving the testator, for 'relations' primarily means 'next of kin' according to the statute.² The vesting must await the death of the one named — the one to whom 'next of kin' or 'relations' refers — and will apply only to those who first answer the description, without regard to the question whether by the terms of the will the distribution is to take place then or afterwards.³

This rule of construction, above named, which makes the death of the testator the time for ascertaining the next of kin (or the like), is not affected by the fact that the terms of the will may restrict the gift to such of the next of kin as 'shall be living' at the time of distribution; for this merely adds another element to the qualifications required in the objects. A testator directed that personalty and the produce of realty should be invested to accumulate for ten years, and that then a certain part of the fund should be divided among such of his next of kin and personal representatives as should then be living. It was held that the next of kin at the testator's death, surviving the ten years, were intended.⁴

¹ *Wharton v. Barker*, supra.

² *Varrell v. Wendell*, 20 N. H. 431; *Drew v. Wakefield*, 54 Maine, 291; ante, p. 153.

³ *Jarman*, 983.

⁴ *Spink v. Lewis*, 3 Bro. C. C. 355; *Bishop v. Cappel*, 1 DeG. & S. 411.

Similar questions often arise upon gifts to children, or to brothers or sisters or other classes of relatives.

Gifts to children or other classes of relations.

What is the point of time at which the class is to be ascertained? The general answer is, that an immediate gift to a class of persons takes effect in favor of those who constitute the class at the death of the testator, unless a contrary intention can be found in the will or in such external facts as legitimately bear upon the case.¹ That will be the result then when the point of time is not designated by the testator, or when it is left indefinite by him.² Taking the case of children for convenience,³ as the commonest, it makes no difference whether the gift be to the children of a person living or a person dead, or whether to children simply or to all the children.⁴ In some of the authorities, however, the date of the will, instead of the death of the testator, is treated as the point of time to reckon from.⁵

¹ *Russell v. Russell*, 84 Ala. 48; *Campbell v. Rawdon*, 18 N. Y. 412; *Dawson v. Schaefer*, 52 N. J. Eq. 341, 344; *Chasmar v. Bucken*, 37 N. J. Eq. 415; *Howland v. Slade*, 155 Mass. 415, 416; *Lee v. Gay*, id. 423; *Peck v. Carlton*, 154 Mass. 231, 233; *Lombard v. Willis*, 147 Mass. 13; *Whitney v. Whitney*, 45 N. H. 311; *In re Mervin*, 1891, 3 Ch. 197, 202. But a different case arises if there be no object in existence at the testator's death. See *infra*, p. 292.

² *Jenkins v. Freyer*, 4 Paige, 47.

³ That the rule applies as well to brothers and sisters, nephews and nieces, and cousins, see *Jarman*, 1015. 'But with regard to other classes of objects the gift would clearly apply and be confined to those who were living at the death of the testator.' *Id.*

⁴ *Jarman*, 1010.

⁵ See *Biggs v. McCarty*, 86 Ind. 352; *Merriam v. Simonds*, 121 Mass. 198; *Yeaton v. Roberts*, 28 N. H. 459; *Post v. Herbert*, 12 C. E. Green, 540.

Under the English Wills Act, it is held that in the case of a devise over if the devisee should 'die without leaving any male issue,' male issue living at the death of the testator is presumptively meant. *Upton v. Hardman*, Ir. R. 9 Eq. 157, followed with some hesitation in *In re Edwards*, 1894, 3 Ch. 644.

Where however a particular estate is carved out, with a gift thereupon to the children of the person taking such estate, or the children of any other person, the gift will embrace *prima facie* not only the objects living at the death of the testator, but those who may afterwards come into existence down to the time of distribution, and those only.¹ Thus a testator makes a devise or a legacy to A for life, and after his death to the children of B. B has children living at the time of the testator's death, and others born afterwards before the death of A. All these children take; children born after A's death would not.² Here again, the construction is not affected by a gift over in case of the death of any of the children under a stated age.³ It is not necessary that the prior estate should be for the life of the person taking it; the construction applies though the estate is to be determined in any other way, as by bankruptcy, —all who are in existence down to that point of time, and those only, being embraced in the gift.⁴

Particular estate, with gift to children of devisee or of another.

The rule of construction under consideration applies not only to gifts in which the subsequent interest is a

¹ *Budd v. Haines*, 52 N. J. Eq. 488, 491; *Ridgeway v. Underwood*, 67 Ill. 419; *In re Baer*, 147 N. Y. 348; *Bisson v. West Shore R. Co.*, 143 N. Y. 125; *Biggs v. McCarty*, 86 Ind. 352; *Bradley's Estate*, 166 Penn. St. 300; *Hall v. Hall*, 123 Mass. 120; *Blass v. Helms*, 93 Tenn. 166, 170; *Harris v. Alderson*, 4 Sneed, 250; *In re Winter*, 114 Cal. 186, 190; *Jones's Appeal*, 48 Conn. 60; *In re Mervin*, 1891, 3 Ch. 197, 202. See also *Stanley v. Stanley*, 92 Va. 534, where there seem to have been no after-born children. As to gifts and postponement of enjoyment, see ante, p. 255.

² *Ayton v. Ayton*, 1 Cox, 327.

³ *Berkeley v. Swinburne*, 16 Sim. 275.

⁴ *In re Smith*, 2 Johns. & H. 594; *In re Aylwin*, L. R. 16 Eq. 590. See *In re Bedson*, 28 Ch. D.

remainder in realty, or what in personalty corresponds to a remainder, but also to executory gifts, Rule of construction applies to executory gifts. to take effect in defeasance of a prior estate. Thus if a legacy be given to A, son of B, and if he shall die under age, to the other children of B, on the happening of the event all the children who shall then have been born, with those living at the testator's death, will take.¹ The principle, indeed, seems to extend to every future limitation, as for instance to a gift to the testator's children, to be divided among them at the expiration of twenty years after his death.²

The mere charging of lands, however, as for the payment of debts or legacies, where the vesting in possession is not postponed, will not let in future children. A testatrix devised lands for Mere charging of lands will not postpone distribution. terms upon trust to raise certain sums of money to pay annuities, and subject to the terms gave the estate to all and every child and children of her brother A. The question was whether children of A, born after the death of the testatrix, but during the period of the annuities, were entitled, with children born before the death of the testatrix. It was held they were not, because the estate was given directly and not at a future period.³

A more difficult case is presented where the period of distribution is postponed until the happening of some

¹ See *Blackman v. Fysh*, 1892, 3 Ch. 209.

² *Jarman*, 1012 for the paragraph; *Oppenheim v. Henry*, 10 Hare, 441, for the example.

³ *Singleton v. Gilbert*, 1 Bro. C. C. 542, note; s. c. 1 Cox, 68. So in cases of personalty. *Hill v. Chapman*, 3 Bro. C. C. 391; s. c. 1 Ves. Jr. 405.

event affecting each member of the class, but liable to happen to one at one time and to another at another. The point of time for fixing the members of the class cannot arrive, according to the preceding rule, until the event happens, but the event may happen more than once; which happening is the one to be fixed upon? If the first, then only those who are in existence at that time are entitled to share the gift; if the last, then those who have come into existence since the first happening must be added to the number.

Event happening at different times.

In marriage settlements the last happening of the event has been fixed upon; but in wills, though not without the suggestion of doubt,¹ the first happening. That is to say, the point of time for determining who constitute the members of the class to share the gift is reached when the event first happens to any of the class in question. Thus where the event named is the attainment of a given age by the members of the class, the gift will go to those who are living at the death of the testator and with them to those who come into existence before the first child, in the case of children, attains the age, and to those only. A testator bequeathed a residue of property 'unto all the children of A equally, when they shall severally attain the age of twenty-five years'; and it was held that the gift included all the children born before one of them attained twenty-five, though born after the testator's death, but did not include those born after one attained the age.²

The case may be such that some of the members of the class are already of the required age at the death of

¹ *Andrews v. Partington*, 3 Bro. C. C. 401; *Brandon v. Aston*, 2 Younge & C. C. C. 30; *Darker v. Darker*, 1 Cromp. & M. 850. But the rule appears to be settled and justified, against the doubts. See *Jarman*, 1016.

² *Hubbard v. Lloyd*, 6 Cush. 522.

the testator or other person named. If it is, the number of the class is fixed at that time; it cannot be enlarged by children born afterwards.¹ For this rule must be applied consistently with the rule that makes the death of the testator or other person the point of time where no *later* event is fixed upon by the will. But if no child has reached the given age at the time of such death, then those who come into existence down to the time when such event does happen will be included.² There are then, in reality, two events in the case, the death of the testator (or other person) and the attaining of the given age; the later of the two being the one to fix upon.

It may, indeed, be found that the testator has added another event, but the rule will be the same; the happening of the last of the events marks the point of time for ascertaining the members of the class.³ Thus a testator gave a fund in trust for A for life or until alienation, and in either event for such of A's children as should attain twenty-one, to be paid to them on attaining that age if that should happen after the death of A, and if he should then be living to be paid on his death. A alienated, and his interest accordingly ceased, and now two of his children, who were of age, claimed payment of their shares; but this was refused on the ground that their shares might be cut down by after-born children of A.⁴

¹ That is, the time cannot be extended until the first one reaches the age *after* the testator's death.

² *Clarke v. Clarke*, 8 Sim. 59.

³ This case should not be confused with the one which makes the *first* happening of *one* stated event, such as attaining twenty-one years, the point of time for ascertaining the members of the class.

⁴ *Brandon v. Aston*, 2 Younge & C. C. C. 24, 30; *Jarman*, 1015, for the paragraph.

It is sometimes provided in cases of trusts for children until the attainment of a given age that the trustees are authorized to advance the 'shares' or some ^{Advancing} part thereof, before the period of distribu- ^{'shares.'} tion. Such a provision does not affect the rule of construction just stated; the word 'shares' being taken in the sense of 'shares presumptive,' and not final, thus leaving the actual shares open and subject to the effect of further births.¹ It is not uncommon either to add a 'clause of accruer,' a clause by which survivors or a single survivor at the time of distribution shall become entitled, in event of the death of any of the 'said children.' But neither will such a clause affect the rule, for 'said children' is deemed to mean the children already provided for, that is, all those in existence at the time of distribution.²

The rule fixing the point of time for determining the members of the class at the date when the first one becomes entitled, does not mean that all the ^{Contingency} members of the class are thereby, ipso facto, ^{must happen to} entitled to share the property, for the con- ^{each member of} tingency is still a personal one to each member. Thus where the contingency or event is the attaining twenty-one, each member must live to attain that age before being entitled to a share. So, too, while the contingency in relation to any child is in suspense, it is obviously impossible to say how much those are entitled to receive to whom the event has already happened. All that can certainly be affirmed is that the number of the class cannot be enlarged, and hence that the minimum of each share is fixed.

¹ Jarman, 1016; Titcomb v. Butler, 3 Sim. 417. See *In re Holford* 1894, 3 Ch. 30; *In re Jeffery*, 1895, 2 Ch. 577.

² Balm v. Balm, 3 Sim. 492.

These rules, it must be remembered, are only rules of prima facie operation; they apply only in case no intention opposed to them appears. But they will not yield merely because to apply them will defeat a gift. Construction may and usually will be changed in a case of doubt between two possible interpretations, in order to save a gift, though otherwise there might not be enough evidence of intention to change the construction; but where the language raises no doubt, the construction will be applied though the result be to destroy a gift. An example may be seen in a case in which the gift is too remote, upon the words used, to take effect, because of the rule against perpetuities.¹ Thus a testator bequeaths a fund to the children of a living person in case they shall live to attain twenty-two years. The gift violates the rule mentioned, unless one of them had attained the age at the time of the testator's death;² and the words of contingency will not be construed so as to make the gift vested, as by declaring that it is a case in which the time of enjoyment merely is postponed.³

But in a case of doubt, as we have said, the rule may be held inapplicable in order to save the gift. A testator bequeathed the residue of his personalty in trust for A for life, remainder to the grandchildren of B, 'to be by them received in equal proportions when they shall severally attain the age of twenty-five years.' It was considered that the time of enjoyment was meant to be made distinct from the time of gift, in other words, that the gift was vested and only the enjoyment of the res postponed.⁴ In another case

¹ Ante, p. 96.

² *Picken v. Matthews*, 10 Ch. D. 264

³ *Leake v. Robinson*, 2 Mer. 363, 383.

⁴ *Kevern v. Williams*, 5 Sim. 171.

a testator made a bequest to the children of A, a living person, 'as and when they should attain their respective ages of twenty-two years,' and directed that the interest on their shares should be accumulated and should be paid to them as and when the principal became payable. The gift to the children was upheld; the construction adopted being that the testator meant those children who might be living at his death.¹ The direction to pay interest indicated that the gift was to be treated as vested.²

There is one case, however, in which a construction will be adopted different from the one which generally applies to language free from doubt, in re- Legacy to be paid out of general personal estate. regard to gifts to children on attaining a given age, and that is this: Where a legacy is given to be paid out of the testator's general personal estate, and is made payable to the children at a given age, the gift is to be treated presumptively, as confined to children in existence at the death of the testator.³ If the ordinary rule were to be applied, it would result in the serious inconvenience of postponing the distribution of the general personal estate of the testator until the eldest child attained the stated age; to prevent such inconvenience the rule of construction is changed. But this change prevails only where the aggregate amount of legacies to the children would be left open to doubt till the eldest child reached the age.⁴

¹ *Elliot v. Elliot*, 12 Sim. 276; *In re Coppard*, 35 Ch. D. 350.

² *In re Coppard*, *supra*.

³ Hence the gift fails if there are no children in existence at that time. *Rogers v. Mutch*, 10 Ch. D. 25.

⁴ *Gilmore v. Severn*, 1 Bro. C. C. 582. See *Evans v. Harris*, 5 Beav. 45; *Jarman*, 1019.

Thus far it has been assumed that some object was in being at the time which the rule of construction fixed upon for determining the members of the class. But what is the result where there was no one then in being?

No object in being at time of distribution.

If the gift was immediate, the death of the testator, as we have seen, is the point of time for reckoning the membership. But if at that time no one of the objects should be in existence, the gift will be construed to embrace *all* children (in a case of children) who may thereafter be born; the gift being considered executory.¹ A testator gave moneys to be put at interest; one moiety to be paid to the younger children of A living at the testator's death, the other moiety to the children of B and C. Neither of the last named had any children at the date of the will or at the death of the testator. It was held that all children which they might at any time have were entitled.²

If the gift is preceded by an anterior interest, and is a gift of personalty, a like rule, by the better view, prevails; if no object has come into existence at the expiration of the anterior interest, then all the after-born members of the class are entitled.³ If the gift is of freehold lands, a more special case is made. It is a rule of the common law that the freehold shall not be in abeyance, and the consequence is that a remainder in a

¹ *Male v. Williams*, 48 N. J. Eq. 33, 36.

² *Weld v. Bradbury*, 2 Vern. 705; *Male v. Williams*, supra. As to the destination of the income between the death of the testator and the birth of a child, and as to the appropriation of the income between the birth of the first and the birth of the last child, see *Jarman* 1024-1026.

³ *Male v. Williams*, 48 N. J. Eq. 33, 36; *Jarman*, 1027-1030. 'A bequest to A for life, and after his death to the children of B is not defeated by the non-existence of an object at the death of A, but will take effect in favor of *all* the subsequently born children as they arise.' *Id.* 1029.

freehold, having no one to take it when it falls in by the expiration of the particular estate, fails; the after-born children then, in the case in question, would not be let in, at law. But equity, in a case within its jurisdiction, as in gift in trust, would sustain the gift in favor of all the after-born children, as an executory devise. A testator devised lands to trustees upon trusts during the life of A, and at his death as to one moiety in trust for such child or children of A as he should leave, and as to the other moiety in trust for the children of B merely. B had no child until after A's death, and then he had a child. It was held in equity that this after-born child was entitled to the second moiety; the objection of the abeyance of the freehold being practically obviated by the estate in the trustees.¹

Another case in which a testator has failed to provide for an incident of a gift to children arises where children are substituted for their parents, who fail to fulfil the terms upon which the gift is made to them; as where they are to take at a given time and die before the time is reached. The question is, whether, in the absence of provision for the case, the children are subject to the same contingency to which their parents were; in other words, whether the substituted gift is to be construed as applying only to such as may happen to be living at the time designated

Children substituted for parents.

¹ Chapman v. Blisset, Cas. t. Tal. 145. Jarman on p. 1032 says: 'The weight of authority, therefore, is decidedly in favor of the position that all gifts to children, preceded by an anterior interest, will embrace the objects existing at the death of the testator, and those who may come in esse before the determination of such interest; and that in all such cases, except in the instance of a legal remainder of real estate, if there be no object at the time of the vesting in possession, all the children subsequently born will be let in, unless the terms of the gift restrict it to a narrower class of objects.'

(for the parents), or whether those who survive their parents are entitled. After some doubts, it appears to have become accepted doctrine that the children are not required to survive the period in question.¹ The distinction is based upon this ground: The gift over to the children in the event of the death of the parent before the time named is not by the language of the testator a gift to them if they then be living. Hence it is not to be considered that they must be living at the given time, to take the gift, though the contrary would be true of the prior gift to the parent.²

Similar question arises where a testator makes a gift to younger children, without designating the point of time for determining the children who are to take. In the case of an immediate devise or legacy the gift presumptively applies, as might be expected, to those who answer the description at the death of the testator.³ It seems, too, that where a gift is made to a person for life and after his death to the younger children of A, the gift vests at the death of the testator in those who then answer the description, subject to be divested pro tanto in favor of those who afterwards come into being during the lifetime of the life tenant.⁴ But there is this qualification to the rule, at least in England: Where the gift is by a father or one in loco parentis, a gift to younger children is to be construed presumptively as applying to the persons who shall answer the description at the time when the portions become payable; for it is obvious that a younger

¹ *Lamphier v. Buck*, 2 Dru. & Sm. 484; *In re Merrick*, L. R. 1 Eq. 551; *In re Wildman*, 1 Johns. & H. 302; *In re Pell*, 3 DeG. F. & J. 293; *Crane v. Bolles*, 49 N. J. Eq. 373, 383.

² *Lamphier v. Buck* and *Crane v. Bolles*, *supra*. Post, p. 366.

³ *Jarman*, 1062.

⁴ *Id.*

may have become an elder child at that time, and as such have been provided for.¹

In other cases than those of parental provision, it is considered to be the rule that, in every case of a future gift to younger children, whether the gift be vested or contingent, provided that if contingent the contingency is not such as to limit the gift in terms to those who should be younger children at the time of distribution or other time, the gift will take effect in favor of those who sustain the character at the death of the testator and who afterwards come into being before the contingency happened, in the case of a contingent gift; as in the case of gifts to children generally. The result, if this is true, is that a child in whom a share vested at the death of the testator would not be excluded by becoming the eldest before the time of distribution.² But there are cases opposed to this doctrine.³

The converse case of a gift to the elder children sometimes arises, the rule of construction applicable being probably the same. In the case of an Gifts to elder children. immediate gift, the testator's death is the point of time for determining the objects; in the case of a future gift after a remainder or like interest, the termination of that interest; in the case of a future contingent gift, the happening of the contingency, according to the nature of the same. A testator gave legacies to the two oldest children of A, not naming them, and after the death of one of them made a codicil confirming his will so far as not altered by the codicil, and took no notice of the legacies. It was held that the two oldest children living at the testator's death were entitled.⁴

¹ Jarman, 1063.

² Id. 1065.

³ Id.; *Hall v. Hewer*, Amb. 203; *Ellison v. Airy*, 1 Ves. 111.

⁴ *Miles v. Boyden*, 3 Pick. 213.

If, however, the gift is to 'the eldest' son or child, it seems that the person answering that designation at the date of the will is presumptively the one intended, so that in case of his death before the death of the testator there will be a lapse, unless statute prevents, or unless the testator has, in such event, provided for the case. If the gift is to the 'first' or 'second' son, and there is no such son at the date of the will, or at the testator's death, the first son who afterwards comes into being is entitled.¹

In like manner, testators sometimes make gifts to children 'to be' born or begotten, without designating the point of time when the class is to be considered as fixed. Such cases are subject to certain rules, the chief of which is this: If the gift is immediate, so that, but for such words, it would have been confined to children, if any, in being at the testator's death, the words will have the effect, *prima facie*, of extending it to all who may come into being at any time.² A testator devised land to trustees in trust to pay the rents in support of the child and children begotten 'and to be begotten' of his daughter A. Children of A were born after the date of the will, and before and after the testator's death. It was held that the construction to be put upon the words 'to be begotten' should be such as to make them include, not merely the children born between the date of the will and the testator's death, but those also who were born after his death.³

But as in the case elsewhere mentioned, of general pecuniary legacies payable simply to children at a given age, so now if the gift is a pecuniary legacy payable ont

¹ Jarman, 1072.

² *Id.* 1034.

³ *Mogg v. Mogg*, 1 Mer. 654, an important case; *Gooch v. Gooch*, 14 Beav. 565; s. c. 3 DeG. M. & G. 366.

of the general personal estate to children 'to be' born or begotten, the rule of construction above stated does not apply, where the effect of letting in children born after the death of the testator would be to postpone the distribution of the general estate (out of which the legacies are payable) until the death of the parent of the legatees.¹ A testator bequeathed a sum of money 'to each child that may be born to either of the children of either of my brothers, lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years, without benefit of survivorship.' It was held that the gift was restricted to children living at the death of the testator; 'may be born' referring to the time between the date of the will and the testator's death. This, as in the other case, because it would work inconvenience to await the birth of children as long as they might be born.²

Obviously the same should be true where the distribution would be postponed in any other way.³ A testator gave the residue of his personalty in trust for his wife for life, and after her death to Distribution otherwise postponed. such of his two daughters and such of their children as she should by will appoint, desiring her 'to provide for such child or children as may *hereafter* be born of my said two daughters.' It was held that the power given did not affect the case; only children born in the lifetime of the testator's wife were entitled.⁴ In another case a testator gave a legacy to and among the children of A born and 'to be' born, as many as there

¹ Jarman, 1035.

² *Storrs v. Benbow*, 2 Mylne & K. 46; s. c. 3 DeG. M. & G. 390; *Townsend v. Early*, 28 Beav. 429; s. c. 3 DeG. F. & J. 1 (on the same will).

³ Jarman, 1036.

⁴ *Paul v. Compton*, 8 Ves. 375.

might be on their attaining twenty-one or marrying. The children living at the testator's death and such (in accordance with the rule elsewhere stated) as afterwards came into being before the first share vested in possession were deemed entitled.¹

A gift to 'children' or to 'descendants' raises, or may raise, another question within this branch of construction; the testator having failed, not by leaving the meaning of 'children' or of 'descendants' in doubt — that would be a case within the other branch of the subject — but by not declaring distinctly how the children or the descendants are to take, whether per capita, that is, individually, or per stirpes, that is, by stocks or representation as a body.

The courts have in most cases considered that the parties should take per capita, and that too whether the gift be to the children or the descendants equally or simply to the children or the descendants. Thus in the case of a gift to the 'descendants of A now living,' if A had a son living and two grandsons, the children of a son deceased, the gift would be divided, not into two parts as it would be if the descendants were to take per stirpes, but into three parts, son and grandsons being counted individually.

To name the children or descendants is to make a clear case. Thus where a devise is made to children and grandchildren, or to brothers and sisters and nephews and nieces, their children, to be equally divided between

¹ *Whitbread v. St. John*, 10 Ves. 152; *Parsons v. Justice*, 34 Beav. 598. But see *Eddowes v. Eddowes*, 30 Beav. 603, in which *Whitbread v. St. John* was not cited. Conversely 'to be born' or even 'hereafter to be born' does not exclude those born before. *Coke*, Litt. 20; *Doe v. Hallett*, 1 Maule & S. 124; *Almack v. Horn*, 1 Hem. & M. 630; *Jarman*, 1038.

them, as for instance, 'share and share alike' or the devisees are individually or numerically¹ named, they take per capita, not per stirpes.² Indeed it is enough for the testator to designate the objects of his bounty by their relationship to a living ancestor, to make them take per capita.³ Moreover the devisees in such cases take as tenants in common, and not as joint tenants, and hence no rule of survivorship prevails among them.⁴ A possibility of lapse is the result.⁵

But the context may readily indicate that that was not the intention of the testator; it seems that the favor of the per capita rule is but the slenderest one.⁶ A testator declared, in a gift of resi-
Slender favor
of per capita
rule.
due, that the descendants 'or representatives' of each of his first cousins deceased should take

¹ *Bancroft v. Fitch*, 164 Mass. 401, 402, 'my three daughters.' See *In re Kimberly*, 150 N. Y. 90 ('my three sisters' named); *Moffett v. Elmendorf*, 155 N. Y. 475, 485.

² *In re Stone*, 1895, 2 Ch. 196, 201; *In re Yates*, 1891, 3 Ch. 53, 57; *Horton v. Earle*, 162 Mass. 448; *Moffett v. Elmendorf*, 152 N. Y. 475; *Kean v. Roe*, 2 Harrington, 103; *Shull v. Johnson*, 2 Jones, Eq. 202; *Budd v. Haines*, 52 N. J. Eq. 488; *Penney's Estate*, 159 Penn. St. 346; *Jones v. Hunt*, 96 Tenn. 369; *Crawford v. Redus*, 54 Miss. 700. See *Bigelow v. Clap*, 166 Mass. 88; *Scott's Estate*, 163 Penn. St. 165.

³ *Young's Appeal*, 83 Penn. St. 59.

⁴ *Moffett v. Elmendorf*, 152 N. Y. 475; *Hiestand v. Meyers*, 150 Penn. St. 501; *Stanley v. Stanley*, 92 Va. 534; *Bolles v. Smith*, 39 Conn. 217, 218; *Morris v. Bolles*, 65 Conn. 45, 52; *Frost v. Courtis*, 167 Mass. 251, 253; *Swallow v. Swallow*, 166 Mass. 241; *Bancroft v. Fitch*, 164 Mass. 401; *Horton v. Earle*, 162 Mass. 448. See ante, p. 95. This rule will yield to evidence of a different intention — as these cases declare; but not so readily as the per capita rule, now to be considered. The law prefers tenancy in common to joint tenancy. *Morris v. Bolles*, ut supra.

⁵ Same cases; also *Morris v. Bolles*, 65 Conn. 45, 52; *Bill v. Payne*, 62 Conn. 140.

⁶ *Ashburner's Estate*, 159 Penn. St. 545, 546; *Woodward v. James*, 115 N. Y. 346; *Vincent v. Newhouse*, 83 N. Y. 505; *Howell v. Tyler*,

equal shares with his then living first cousins. The court felt some doubt whether the descendants of cousins were to take with the living cousins per capita or per stirpes, so easily was the meaning made doubtful; but on the whole it was held that they took per stirpes, that is, each set of children stood as a body in place of their parent. This view was based upon the idea that persons taking, though in a will, as representatives were presumably to take as the statute in case of intestacy provided.¹

Indeed it is held that in the case of a gift of realty to children or to descendants, the statute relating to intestacy should always, *prima facie*, be regarded as expressing the testator's meaning; the objects accordingly would take per stirpes.² A testator gave real and personal estate to the heirs of A, whose heirs were two children of a deceased sister and three children of a deceased brother. It was held that the personalty should be divided per capita and the realty per stirpes.³ A testator devised land to be divided as follows: 'between the children of my brother A deceased, and the children or heirs of my sister B deceased and my brother D or his heirs or legal representatives.' It was held that the children took per stirpes.⁴ In another case a testator

91 N. C. 207; *Balcom v. Haynes*, 14 Allen, 204; *Raymond v. Hillhouse*, 45 Conn. 467; *Young's Appeal*, 83 Penn. St. 59. See *Geery v. Skelding*, 62 Conn. 499; *In re Stone*, 1895, 2 Ch. 196; *Ihrie's Estate*, 162 Penn. St. 369.

¹ *Rowland v. Gorsuch*, 2 Cox (Eng.), 187.

² See *Ashburner's Estate*, 159 Penn. St. 545.

³ *Hayes v. King*, 37 N. J. Eq. 1. See *Fissel's Appeal*, 27 Penn. St. 55; *Mills v. Thorne*, 95 N. C. 362; *Lowe v. Carter*, 2 Jones, Eq. 377; *Woodward v. James*, 115 N. Y. 346; *Richards v. Miller*, 62 Ill. 417; *King v. Savage*, 121 Mass. 303; *Bassett v. Granger*, 100 Mass. 304; *Bailey v. Bailey*, 25 Mich. 185; *Raymond v. Hillhouse*, 45 Conn. 467; *Cook v. Catlin*, 25 Conn. 387; *Henry v. Thomas*, 118 Ind. 23.

⁴ *Fissel's Appeal*, *supra*; *Geery v. Skelding*, 62 Conn. 499. See *Moffett v. Elmendorf*, 152 N. Y. 475.

devised to A and B and their heirs and assigns, to share alike between them (A and B), and their heirs and assigns. This too was held a case for the rule of division per stirpes.¹

The use of the word 'heirs' appears to be enough to overturn the per capita rule;² unless the word is accompanied by some qualification inconsistent with sharing per stirpes, such as, 'sharing equally,' or 'share and share alike,'³ not referring to classes.⁴ But it is probably going too far to say that the presumption in favor of the per capita rule, where it might apply, has given way to a contrary one.⁵

¹ *Miller's Appeal*, 35 Penn. St. 323.

² *Balcom v. Haynes*, 14 Allen, 204; *Ashburner's Estate*, 159 Penn. St. 545, 547; *Hock's Estate*, 154 Penn. St. 417, 421; *Conklin v. Davis*, 63 Conn. 377 ('pro rata among the heirs'); *Thomas v. Miller*, 161 Ill. 60.

³ *Parrish v. Groomes*, 1 Tenn. Ch. 581; *Puryear v. Edmonson*, 4 Heisk. 43; *Richards v. Miller*, 62 Ill. 417; *Tuttle v. Puitt*, 68 N. C. 543.

⁴ *Lyon v. Acker*, 33 Conn. 222. See *Alder v. Beall*, 11 Gill & J. 123.

⁵ In *Henry v. Thomas*, 118 Ind. 23, it is said that this result has come about; but the authorities do not sustain the statement. See also *West v. Rassman*, 135 Ind. 278.

CHAPTER XXIII.

SECONDARY CONSTRUCTION: CLAUSES.

IMPLICATION.

Not only are technical words unnecessary to create an estate by will, ordinary words suited to the purpose of creating estates are not always necessary. That is, it is not necessary to say 'I will,' 'I devise,' 'I bequeath,' 'I give,' or the like, in order to create an estate in a devisee or legatee.¹ More than that, an estate may be created by implication, without a word of express gift. Intention to create must of course appear on the face of the will, but it is plain that one may manifest intention by indirection as well, though not so plainly, as by direct language; for express language after all is only a symbol for ideas, and if another symbol on the face of the will conveys the idea in question the result should be the same. It is then only a

¹ Nor is it necessary in a will, even at common law, to use the word 'heirs' to create a fee. And by statute generally an estate in fee is created by a devise in the absence of evidence to the contrary on the face of the will, assuming that the testator owned the fee, where at common law only a life estate would pass. See e. g. *Brown v. Gilbert Hospital*, 156 Mass. 323, 325; *Goodwin v. McDonald*, 153 Mass. 481. If the testator has less than a fee, then presumptively, by statute in many States, all his interest passes. See e. g. *Kent*, iv. 538. A charge upon realty can be created by implication. *Dickerman v. Edinger*, 168 Penn. St. 240. E. g. by blending real and personal estate in a residuary gift. *Sloan's Appeal*, id. 422; *Turner v. Gibb*, 48 N. J. Eq. 526; *Merritt v. Merritt*, id. 1, 8; *Stevens v. Flower*, 46 N. J. Eq. 340. See *infra*, p. 314.

matter of the plainer symbol, or the symbol not so plain, but yet, it may be, plain enough to be understood. In order therefore to justify the courts in declaring the existence of an estate by implication, the implication must be plain in sound theory, as plain as anything can be, short of express language.¹ It may be necessary to examine the whole of the will, as against perhaps a single word or phrase in the case of express language, in order to find the intention from implication; but if from the whole will it appears that there was an intention on the part of the testator to give an estate, that which is essential to the purpose, intention to give, is found, and the estate passes.² Thus if a particular devise or bequest cannot reasonably be accounted for except upon the supposition that the testator intended to make some corresponding disposition of other parts of the property, or of previous estates therein, the court will carry into effect the scheme of the testator by implying such corresponding disposition.³

¹ *Bradhurst v. Field*, 135 N. Y. 564; *In re Vowers*, 113 N. Y. 572; *Barnard v. Barlow*, 50 N. J. Eq. 131; *Metcalf v. Framingham Parish*, 128 Mass. 370, *infra*.

² See *Boston Safe Deposit Co. v. Coffin*, 152 Mass. 95, 100; *Metcalf v. Framingham Parish*, 128 Mass. 370, 374; *Grout v. Hapgood*, 13 Pick. 159, 164; *Ferson v. Dodge*, 23 Pick. 287, 293, 294; *Deering v. Adams*, 37 Maine, 264; *Rathbone v. Dyckman*, 3 Paige, 9.

³ *Rathbone v. Dyckman*, *supra*, Walworth, Ch., at p. 27; *Bradhurst v. Field*, *supra*.

The rule is thus stated by Gray, C. J., in *Metcalf v. Framingham Parish*, *ut supra*, after stating that the testator's intention must not be supplied by conjecture: 'But if a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication, and so mould the language of the testator as to carry into effect, as far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared.' Quoted in *Boston Safe Deposit Co. v. Coffin*, *ut supra*.

Implication then supplies omission of language of gift, where there is still enough on the face of the will to justify the court in supplying the unexpressed intention. Though the term is commonly used in a somewhat restricted sense, implication may be based upon a variety of causes; it will be sufficient to notice some of the commonest, to wit, (1) Verbal ellipsis, (2) Mistake of fact or law, (3) Ellipsis prior, (4) Ellipsis subsequent.

The first of these causes is of constant occurrence. It is given only to the trained writer to write with precision; indeed no one writes much without Verbal ellipsis. more or less verbal ellipsis, whether mere slips of the pen or meditated omission. Omission may be such as to be fatal; it must be borne in mind that it is only where words of gift are plainly to be understood that they can be read into the will. The case is commonly one for simple interpretation. The following may be taken as a typical example: A testator devised 'to the first son of A severally and successively.' Literally taken that is nonsense, but the case plainly is one of mere verbal ellipsis of words of gift to the other sons of A, who were to take severally and successively in order of age. The intention was fairly plain, and the younger sons took by implication.¹ But this is nothing more than simple interpretation.²

Mistake of fact or of law is not uncommon, and while it may be fatal there may still be enough to enable the courts to find the intention and to declare the existence of an estate by implication as if the mistake were truth; for this is not a case for correcting mistakes. Cases of gift by misrecital may be

¹ *Parker v. Tootal*, 11 H. L. Cas. 143.

² See also *Young v. Harkleroad*, 166 Ill. 318.

taken for example. These are cases in which will or codicil recites, or in any sufficiently clear way states, contrary to the fact, that a gift has already been made. In such cases the courts take the recital or statement, though erroneous, as conclusive evidence of an intention to give by the will and supply the gift.¹ The testator gave one moiety of certain property to A; if A should die under twenty-one, to B; if B should die before a certain event, to E; after E's death, to F. If E should die without issue, A and B, or either, then living, the 'said' moiety 'before given to the said E should go to A and B.' It was considered that A and B were to take the *other* moiety of the property, of which A took the first; there was an ellipsis of words of gift which the court supplied.²

A testator gave to A '£500 in addition to £1500 before bequeathed' to him. As a matter of fact he had only given to the legatee £500 in the will and £500 in a codicil prior to the present. But it was held that the legatee was entitled to £2000, by implication.³

The word 'implication,' as applied to such a case, becomes, it should be observed, a technical term, and its meaning is accordingly a matter for the judge. The significance of this statement may be seen in the fact that, while it might naturally be supposed that the 'implication' would work as well to cut down a gift as to enlarge one, the contrary is true. For the case is one in reality of doubt, upon the intention of the testator, and a clear gift, as has elsewhere been seen, is not to be cut down by subsequent words of doubtful import.⁴

¹ Adams v. Adams, 1 Hare, 540; Yates v. Thomson, 3 Clark & F. 572. Compare what is said about conditional revocation, ante, p. 139.

² Bibin v. Walker, AmbL. 661.

³ Jordan v. Fortescue, 10 Beav. 259.

⁴ Mann v. Fuller, Kay, 624; ante, p. 236.

But the intention that the property should pass as if there had been no mistake should be plain. Thus if there has already been a clear gift, the fact that in a codicil, or in another part of the will itself, there is a reference plainly to the same gift, though now a mistake is made in naming it, whereby, taken alone, there would now be a different gift, the devisee or legatee will not be entitled to two gifts. Nor will he be entitled to the second unless it appears that the testator intended to revoke the first. A testator gave, besides certain legacies, his estate at N to his wife for life, and his estate at W, and the estate at N after his wife's death, to others. In a codicil he directed that the legacies should be in lieu of all claims of his wife except the estate for life of his 'wife and her assigns in the premises at W, anything in the foregoing will to the contrary notwithstanding.' It was held that the wife did not take the estate at W.¹

The following is a case of mistake of law: A testator had three daughters, A, B, and C, C being the eldest. To his wife he devised all his lands for life, until C his 'heir' became twenty-one, subject to a certain payment to the 'heir' during the term, and to B and C, after they reached fifteen, a certain portion, the 'heir' to pay to B and C a certain sum of money; and if C his 'heir' died without heir before attaining twenty-one, so that the lands descended to A, then A was to pay B, &c. Here was no express gift to C, and C, though repeatedly called by the testator his heir, was only coheir with her younger sisters A and B. But C was treated as sole heir.²

¹ *Skerratt v. Oakley*, 7 T. R. 492. See *Smith v. Fitzgerald*, 3 Ves. & B. 2.

² *Taylor v. Webb*, Styles, 331. Hale, C. J.: 'The testator was mistaken in his intent that the eldest daughter was his heir, but in-

Cases must be distinguished in which the testator does no more than say that he supposes that a party referred to by him has an interest independent of the will. In such a case the recital or statement is no evidence of an intention to give by the will and hence cannot be treated as a gift by implication.¹ It is a mere case of erroneous supposition of a present state of title, not one of intention to confer title. Nor does it matter that the testator's disposition of his estate turns more or less upon the error, for that is not enough to show by implication that he would confer upon the person supposed to have the interest a title thereto at all events.²

Ellipsis prior, as the term is here used, imports that an estate is given by words which imply, but do not assert, the existence of a prior estate or power. The typical example is found in ^{Ellipsis prior.} cases in which a devise has been made to one person after the death of another.³ It is sometimes asserted in general that such a devise creates by implication an estate for life in the person whose death lets in the express devisee. But that proposition is too broad. It is a well-settled rule of law that an heir is not to be disinherited except by express words or necessary implication; necessary implication here meaning probability so

tended his lands should go according to that mistake; also she that is called heir is to pay the portions to the younger daughters, and no provision is made for her. Therefore, albeit there is no express devise to C, yet she being named his heir, this is sufficient to exclude the rest and to make her sole heir.'

¹ *Adams v. Adams*, 1 Hare, 540, Wigram, V. C.

² See *Jarman*, 491; *Adams v. Adams*, *supra*. But see *Hall v. Litch*, L. R. 9 Eq. 376, of which it is said in *Jarman*, 493, note, that this distinction appears to have been overlooked.

³ In *re Moore*, 152 N. Y. 602; In *re Springfield*, 1894, 3 Ch. 603; *Ralph v. Carrick*, 11 Ch. D. 873.

strong that the contrary cannot reasonably be supposed.¹ Now if the express devisee is, not the heir, but a stranger, there can be no necessary implication of a prior devise, for it is quite reasonable to suppose, in such a case, that the testator purposely left the prior estate undisposed of, so that it might fall to his heir. If on the other hand the express devisee is the heir, the proposition becomes sound; an implied devise for life arises in favor of the person whose death is to let in the heir. Otherwise the heir would take before as well as after that person's death; in which case the whole devise would be unnecessary and nugatory — the heir would take the same estate without any devise. And that clearly would not be the testator's intention. The fact that he devised to the heir after the death of another indicates that he did not intend that the heir should take before.²

The result then in substance, in regard to such a case of ellipsis prior, is this: A devise to the testator's heir after the death of A creates by implication an estate for life in A; a devise to a stranger after the death of A would not create in A any estate by implication.³ It is

¹ *McMichael v. Pye*, 75 Ga. 189; *John v. Bradbury*, 97 Ind. 263; *Eneberg v. Carter*, 98 Mo. 647; *De Silver's Estate*, 142 Penn. St. 74; *Bragaw v. Bolles*, 51 N. J. Eq. 84, 89; *Sutherland v. Sydnor*, 84 Va. 880. To disinherit the heir, the property must be given, expressly or by plain implication, to another; intention to disinherit, however plainly expressed, is not enough. *Gallagher v. Crooks*, 132 N. Y. 338, 342.

² Qu. whether adding some such contingency as the death of A under age, would affect the case? It seems not, though the point has not been squarely decided. See *Jarman*, 512-516. No implied estate to issue arises from a limitation over in case of the death of the prior devisee or legatee without leaving issue at his death. *Monypenny v. Dering*, 7 Hare, 588; *Jarman*, 523, 524. So it seems as to implying a gift to children from a like limitation over in default of children. *Jarman*, 524.

³ *Jarman*, 499.

not necessary that the express devisee should be called the testator's heir to cause the rule of ellipsis prior to apply; enough that he is such in fact. It is quite doubtful whether the rule would apply where the express devise is to several heirs of the testator;¹ it is more than doubtful whether it would apply to cases in which the express devise is to the heir *and another*.²

The existence of a residuary clause may also wholly change the case, where the devise is to the heir after A's death. A residuary clause, by disposing of ^{Residuary} the estate before A's death, leaves no such ^{clause.} ground as that above mentioned for an estate in A by implication. The residuary devisee will exclude the heir. Thus a testator devises to his son after the death of his wife, and then devises the residue of his lands to a stranger; in this case the residuary devisee, and not the wife, would probably take during the wife's lifetime.³

¹ Jarman, 500.

² See *Ralph v. Carrick*, 17 Ch. D. 873, affirming 5 Ch. D. 984; In re Springfield, 1894, 3 Ch. 603, declaring that the rule does not apply to such a case or to a gift to next of kin and to a stranger. The question in the last-named case was of the application of the rule to next of kin alone. Kekewich, J.: 'What is the presumed intention of a gift of personal estate to the testator's next of kin according to the statute, after the death of A? It is this: "I do not intend my personal estate to go immediately on my death to the persons entitled to it by law, that is, according to the Statute of Distributions." If, therefore, you find that those persons are only to take after the death of A, then it may be impossible to give effect to that intention except by implying a gift of a life estate to that person after whose death the next of kin are to take according to the terms of the will. But if, according to the terms of the will, the next of kin are not to take according to the statute, then the reasoning falls to the ground, and you cannot imply a gift to A, whether a wife or not, without doing violence to the terms of the will.'

³ See Jarman, 507; *Stevens v. Hale*, 2 Drn. & S. 28.

Whether the particular phase of ellipsis prior above considered applies to personalty is doubtful. In principle it would appear to make no difference whether a gift to the testator's heir after the death of A were a gift of realty or of personalty. There would seem to be the same ground for implying an estate for life in A in the latter as in the former case; the gift to the heir would be nugatory as well in that case as in the other, if no estate in A arose. And it is as true that the heir of personalty, usually called next of kin under statutes of distribution, is not to be displaced by conjecture, as that the heir of realty is not to be disinherited in that way. There is however authority that the rule in question is confined to estates in land.¹

Doubtless there are other cases of ellipsis prior, both of realty and of personalty, than the foregoing.

Implication by ellipsis subsequent may arise in different ways; it often proceeds from a direction to do a thing which cannot be done without doing something else not named, or which justifies doing something else not named. Thus when a testator directs his executors or trustees to invest real and personal estate, they have by implication the power to sell the land.² So if a testator should direct his executors or trustees to deal so-and-so with the rents of his lands, this would operate as a devise to them, by implication, of the lands.³ So in general, when there are trusts to be

¹ *White v. Green*, 1 Ired. Eq. 45. But see *Jarman*, 510, which agrees with the text.

² *Crnikshank v. Parker*, 51 N. J. Eq. 21, 25; *Going v. Emery*, 16 Pick. 107, 112; *Affleck v. James*, 17 Sim. 121. Cases of implied powers generally fall perhaps under this head. See e. g. *In re Crowther*, 1895, 2 Ch. 56.

³ *Ex parte Wynch*, 5 DeG. M. & G. 221.

executed requiring for their effectual execution an estate in the trustees, such as an estate in fee, the needed estate in the trustees will be implied.¹

Another case: Where a fund has been severed from the testator's estate for the benefit of a tenant for life and then contingently for the remainderman, the fund carries the interest accruing between the death of the tenant for life and the vesting in the remainderman, by presumption. A testator severs leaseholds from the rest of his estate, gives them to trustees for the use of his daughter for life, and then to her children as she shall appoint, in terms authorizing the payment of income of the leaseholds to the children. The daughter appoints to her children upon their attaining twenty-one or marrying, but says nothing of income; and the question is whether the income of the leaseholds is to be treated as going to the children between the time of the daughter's death and the vesting of the interest of one of her children. The question is answered in the affirmative.²

¹ *Deering v. Adams*, 37 Maine, 264, 273; *Hale v. Hale*, 146 Ill. 227, 246; *Crane v. Bolles*, 49 N. J. Eq. 373, 381; *Dean v. Mumford*, 102 Mich. 510, 517.

² *In re Woodin*, 1895, 2 Ch. 309; *Kidman v. Kidman*, 40 L. J. Ch. 359.

Income not mentioned presumptively goes with the principal. This has been called a 'cardinal principle.' *Bective v. Hodgson*, 10 H. L. Cas. 656, Lord Westbury; *In re Holford*, 1894, 3 Ch. 30, 35. In *Kidman v. Kidman*, *supra*, where legacies were given to children conditional upon their attaining twenty-one, after a life annuitant, it was laid down that all the income from the death of the annuitant for life till the children attained the age of twenty-one years must be accumulated and go with the capital, each child on attaining twenty-one taking his or her share of the fund as it then exists. An extraordinary claim of inequality on behalf of the first child reaching the age was put forth in *In re Holford*, *supra*, on the authority of *In re Jeffery*, 1891, 1 Ch. 671, but the claim was denied and *In re Jeffery* overruled. See also *In re Burton*, 1892, 2 Ch. 38.

Further as to interest or income see *In re Inman*, 1893, 3 Ch. 518;

But there are other kinds of ellipsis subsequent, as by failing to define an estate devised. Thus a devise in words indeterminate and without limitation, which standing alone would create only an estate for life, is enlarged to a fee by implication if the testator give the devisee an absolute power of disposal over the property,¹ or if he impose a charge upon the devisee personally or upon the quantum of the interest devised to him; but not if the land is simply devised to him subject to the charge.² But whether the doctrine stand upon anything stronger than simple presumption — whether there can be any *necessary* implication that the life estate is enlarged to a fee — is perhaps a matter for consideration.³ Another important example of implication by a subsequent ellipsis will be found in what follows in regard to charging lands with the payment of debts or legacies.

CHARGING LAND WITH LEGACIES.

The question for consideration under the present head is, what are the rights of general legatees against devisees

Primary mode of payment of legacies: secondary mode.	where there is a deficiency of personal assets of the testator, in cases of imperfectly or incompletely expressed intention of the testator; for legacies are primarily payable out of the per-
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In re Morgan, 1893, 3 Ch. 222; *Iasigi v. Shaw*, 167 Mass. 328; *Wynn v. Bartlett*, id. 292; In re Bartlett, 163 Mass. 509, 521; *Sawyer v. Freeman*, 161 Mass. 543; In re Hodgman, 140 N. Y. 421; In re Stanfield, 135 N. Y. 292; *Lyon v. Industrial School Assoc.* 127 N. Y. 402; *Conant v. Bassett*, 52 N. J. Eq. 12.

¹ *Hensler v. Senfert*, 52 N. J. Eq. 754, 757.

² *Brooks v. Kip*, 45 N. J. Eq. 462, 467; *Groves v. Cox*, 11 Vroom, 40, 43.

³ In many if not in most States, the devise itself, being indeterminate and without words of limitation, would create a fee, instead of a life estate; that by statute, aliter at common law.

sonalty, in the absence of evidence of intention to the contrary. What we have to do then is to look for indication that the primary signification of a legacy is set aside for the secondary, in the matter of the fund out of which it is payable.

It is not to be inferred from the statement that legacies are payable primarily out of the testator's personal estate, that, upon exhausting such estate, without satisfying the legacies, his real estate becomes liable.¹ That is deemed no indication that the secondary mode of satisfying the legacies is to be applied. In the absence of other regulation by statute, it is an established rule in this country, as well as in England, that real estate devised is never to be charged with the payment of legacies or debts unless an intention of the testator to charge it is expressly declared or clearly to be inferred from the language of the will, or unless the charge is a matter of necessary implication from the will.² Accordingly, legacies not actually charged upon the land (if any) must abate in case of deficiency of personal assets.³

In regard to the language of the will, nothing is clearer than that express language is not necessary for the purpose. But if the question of a charge is to be answered upon the language alone, apart from inference based upon modes of disposition of the

Express intention or necessary implication to charge land.

Language should be clear.

¹ The substance of a note by the present writer to Jarman, 1388.

² *Shenk v. Shenk*, 150 Penn. St. 521; *Hibler v. Hibler*, 104 Mich. 274, 277; *Wright v. Denn*, 10 Wheat. 204; *In re Powers*, 124 N. Y. 361; *Clift v. Moses*, 116 N. Y. 144; *Heslop v. Gatton*, 71 Ill. 528; *Stephens v. Gregg*, 10 Gill & J. 143; *Lockett v. White*, id. 480; *Taylor v. Harwell*, 65 Ala. 1; *Knotts v. Bailey*, 54 Miss. 235; *Copp v. Hersey*, 21 N. H. 317; *Bugbee v. Sargent*, 23 Maine, 270.

³ *Heslop v. Gatton*, *supra*.

testator's property, that is, from implication, that language, to create a charge, must be free from doubt.¹ And in a contest between a blood relation and a stranger (not being a creditor) every intendment will be in favor of the former.² A devise on condition that the devisee shall pay a legacy is an example of language sufficient to charge the land.³

Implication of a charge, based upon modes of disposition unaided by language expressing intent to that effect, Necessary im- must, in the common language of the books, plication: blending realty and personalty. be necessary, as we have stated. Such im- plication however arises, by the current of authority, when realty and personalty are blended in one mass and legacies are then bequeathed; or when the testator gives an annuity or other legacy, and then, without creating a trust to pay it, makes a general residuary or other⁴ disposition of the whole estate, blending the realty and the personalty in one fund.⁵ A lady's will

¹ *Stevens v. Flower*, 46 N. J. Eq. 340; *La Foy v. La Foy*, 43 N. J. Eq. 206; *Arnold v. Dean*, 61 Texas, 249; *Seaver v. Lewis*, 14 Mass. 83.

² *Scott v. Stebbins*, 91 N. Y. 605.

³ *Brown v. Knapp*, 79 N. Y. 143; *Loder v. Hatfield*, 71 N. Y. 92; *Sistrunk v. Ware*, 69 Ala. 273; *Merritt v. Bucknam*, 78 Maine, 504; s. c. 77 Maine, 253.

⁴ *In re Bawden*, 1894, 1 Ch. 693.

⁵ *In re Dyson*, 1896, 2 Ch. 720, 725; *In re Bawden*, 1894, 1 Ch. 693; *Merritt v. Merritt*, 48 N. J. Eq. 1, 8; *Turner v. Gibb*, id. 526; *Stevens v. Flower*, 46 N. J. Eq. 340; *Tichenor v. Tichenor*, 41 N. J. Eq. 39 (annuity); *Blake's Estate*, 134 Penn. St. 240; *Chase v. Warner*, 106 Mich. 695; *Hibler v. Hibler*, 104 Mich. 274, 277; *Thayer v. Finnegan*, 134 Mass. 64; *Turner v. Laird*, 68 Conn. 198; *Additon v. Smith*, 83 Maine, 551; *Cady v. Cady*, 67 Miss. 425; *Heatherington v. Lewenberg*, 61 Miss. 372; *Robinson v. McIver*, 63 N. C. 649; *Moore v. Beckwith*, 14 Ohio St. 135; *Hutchinson v. Gilbert*, 86 Tenn. 464; *Thomas v. Rector*, 23 W. Va. 26. In New York the rule appears not to be so strong in favor of the charge; other facts should be added.

contained the provision, 'I hereby devise and bequeath all my real estate, personal property, and household effects (with the provisions below stated) to AB, my nephew.' It then provided that AB was to pay all the debts of the testatrix, funeral expenses, doctor's bills, &c., and a certain legacy to CD. The testatrix then gave a legacy to a certain religious society. It was further provided that upon the death of AB the real estate of the testatrix was to be disposed of in favor of certain persons named. The court now held that a charge was created upon the real and the personal estate of the testatrix for the payment of the legacies.¹ A testator gave to his executors in trust \$15,000, to pay the interest and income thereof to his son A for life. He gave all the rest and residue of his estate, real and personal, to four sisters of A. By a codicil the testator revoked the gift to his son A, and in lieu thereof directed his executors to pay to A annually the sum of \$1000. It was held that this created a charge upon the testator's entire estate.²

The mere fact that land as well as personalty is embraced in a residuary gift, as in the case of a gift of 'all the residue of my real and personal estate,' is nowhere enough to blend it with the personalty in one fund, or to charge it with payment of debts or legacies.³ It has been laid down

Land and personalty in residuary gift.

Briggs v. Carroll, 117 N. Y. 288; *Brill v. Wright*, 112 N. Y. 129; *Hoyt v. Hoyt*, 85 N. Y. 142.

¹ *Chase v. Warner*, *supra*.

² *Merritt v. Merritt*, *supra*. The legacies are still payable primarily out of the personal estate, unless further evidence appear that they are not. In *re Boards*, 1895, 1 Ch. 499. See *Elliott v. Dearsley*, 16 Ch. D. 322.

³ *Bevan v. Cooper*, 72 N. Y. 317; *Van Winkle v. Van Houten*, 2 Green, Ch. 172; *Paxson v. Potts*, *id.* 313.

in New Jersey that the authorities in which a residuary gift including land is deemed to charge the realty with payment of debts or legacies, proceed upon the ground that, unless there has already been a gift of realty, there cannot be a 'residue' of realty; and hence debts or legacies could not be a charge upon the land embraced in the residuary gift.¹ But it is conceded that where the testator has in the prior dispositions of the will massed his real and personal estate in one fund, a gift of the residue unchanged would be a sufficient blending to charge the land embraced in the residuary gift.

In some States no blending would be necessary, because of provisions of statute that the testator's land may be applied to the payment of legacies upon a deficiency of personal assets.² But such statutes probably would not apply to cases in which the testator has manifested his intention *not* to charge his lands. Clearly lands specifically devised would not be charged.³ The fact however that the testator has provided that his debts and legacies shall be paid out of his personal estate will not prevent the lands from being liable, under such legislation. The residuary gift is not made specific by such a direction; and hence upon a deficiency of personal assets the realty must bear the remaining burden.⁴

Returning to the more general authorities, those of the common law, it is laid down that the fact that the residuary donees are to have the residue only after the death of an annuitant legatee subjects the entire estate given to such donees, the realty

¹ Van Winkle v. Van Houten and Paxson v. Potts, *supra*.

² Ellis v. Page, 7 Cush. 161; Wilcox v. Wilcox, 13 Allen, 252.

³ See Wilcox v. Wilcox, *supra*.

⁴ *Id.*; Blaney v. Blaney, 1 Cush. 107.

after the personalty is exhausted, to the payment of the annuity, unless a different intention should appear.¹ When a conversion of the realty and personalty is directed, out of which as a whole the legacies are to be paid, the two funds making the result are to bear the burden ratably, without regard to the rule that the personalty is primarily liable.²

Again a legacy is by many authorities deemed to be charged upon land devised when the testator directs that his debts and legacies shall first be paid, and then devises land, or where he devises the remainder of his estate, real and personal, 'after payment of debts and legacies,' or where he merely devises land 'after payment of his debts and legacies.'³ Indeed it has been laid down that when a testator appoints a devisee his executor, and expressly directs him to pay debts and legacies, the land is charged.⁴ But this proposition is disputed;⁵ indeed, as a new question, there would be ground for question whether a direction to pay debts and legacies should be deemed a charge upon land devised.⁶

¹ *Lapham v. Clapp*, 10 R. I. 543; *Mirehouse v. Scaife*, 2 Mylne & C. 695; *Cole v. Turner*, 4 Russ. 376.

² *Reynolds v. Reynolds*, 16 N. Y. 257.

³ *Reynolds v. Reynolds*, 16 N. Y. 257; *In re Rochester*, 110 N. Y. 159. See also *Baker's Appeal*, 59 Penn. St. 313; *Thayer v. Finnegan*, 134 Mass. 62; *Omstead v. Brush*, 27 Conn. 530; *Allen v. Patton*, 83 Va. 255. But see *Starke v. Wilson*, 65 Ala. 576.

⁴ *Reynolds v. Reynolds*, and other cases *supra*; *In re Brooke*, 1894, 1 Ch. 43, 50.

⁵ *Paxson v. Potts*, 2 Green, Ch. 313, 322; *Van Winkle v. Van Houten*, *id.* 172, 191.

⁶ See the discussion of the authorities in *Jarnman*, 1390-1397; *In re Bingham*, 127 N. Y. 296; *In re Powers*, 124 N. Y. 361; *In re Rochester*, 110 N. Y. 159; *Starke v. Wilson*, 65 Ala. 576; *Miller v. Couch*, 5 Houst. 540.

It is also held that where, in the same sentence or clause in which land is given, the payment of money, as Legacy given for instance an annuity, is imposed upon in same clause the devisee, the same on acceptance is a with gift of land. charge upon the land unless some other provision for payment is made.¹ It is otherwise clearly where the devise and legacy are given in different clauses unconnected.² Nor will the fact that the testator declares his intention to make the legatee equal to the devisee suffice in such a case to charge the land.³ Indeed the Pennsylvania authorities declare that no charge can be held to arise from the mere fact that the testator (though, it seems, in one and the same clause) requires the devisee to pay legacies or debts.⁴

It is quite clear that such direction shows no plain intention on the part of the testator, as a matter of fact, to charge the land; and we have seen that without plain manifestation of intention or necessary implication, no charge can arise. In the absence of language manifesting the intention, it is then a question simply of sound theory whether it should be held that the land devised is burdened with a charge. It is no answer to this to say that there can be no charge where there is no intention as a matter of fact, for it often happens that no such intention is shown; cases of implication show this. It is enough, in accordance with the general theory of construction elsewhere stated,⁵ that there is an imperfectly or incompletely expressed intention — which means that

¹ *Merrill v. Bickford*, 65 Maine, 118; *Thayer v. Finnegan*, 134 Mass. 62; *Sistrunk v. Ware*, 69 Ala. 273; *Porter v. Jackson*, 95 Ind. 210; *Dudgeon v. Dudgeon*, 87 Mo. 218; *Halsted v. Westervelt*, 41 N. J. Eq. 100.

² See, e. g., *Okeson's Appeal*, 59 Penn. St. 90.

³ *Id.*

⁴ *Penny's Appeal*, 109 Penn. St. 323; *Van Vliet's Appeal*, 102 Penn. St. 574.

⁵ *Ante*, p. 155.

the testator never thought out the matter — to justify a rule of the kind, if on other grounds it is considered desirable.

Again the testator's land is charged by implication where a legacy is given after a disposition of all the testator's personalty, for there is nothing else out of which the legacy can be paid.¹ But it is held by some of the authorities that such a case should be made, if at all, by the will itself; the fact that it finally turns out that nothing is left at the time of the testator's death but realty, not sufficing to charge the land.² Clearly, as we have seen, mere insufficiency of the personal estate will not charge the realty, in the absence of statute.

The devisee's acceptance of a devise charged with payment of debts or legacies makes him personally liable in equity to pay the same.³ And the charge will bind all who claim title under the devisee, unless the language of the will is inconsistent with that idea.⁴

¹ *Bevan v. Cooper*, 72 N. Y. 317, 323; *Davidson v. Coon*, 125 Ind. 479; *Paxson v. Potts*, 2 Green, Ch. 313, 321.

² *Brookhart v. Small*, 7 Watts & S. 229 (purpose appearing not to charge); *Tole v. Hardy*, 6 Cowen, 333, 341; *Heslop v. Gatton*, 71 Ill. 528. But see *Perkins v. Caldwell*, 79 N. C. 441; *Lapham v. Clapp*, 10 R. I. 543; *Van Winkle v. Van Houten*, 2 Green, Ch. 172. See also *In re Powers*, 124 N. Y. 361, holding that it may be proper, in the absence of clear manifestation of intention, to look into the condition of the testator's family and the nature of his estate at his death.

³ *Redfield v. Redfield*, 126 N. Y. 466; *Mason v. Smith*, 49 Ala. 71; *Hamilton v. Porter*, 63 Penn. St. 332; *Bugbee v. Sargent*, 23 Maine, 269; s. c. 27 Maine, 338; *Williams v. Nichols*, 47 Ark. 254; *Dunn v. Dunn*, 66 Cal. 157; *Porter v. Jackson*, 95 Ind. 210.

⁴ *Leavitt v. Wooster*, 14 N. H. 550; *Morgan v. Titus*, 2 Green Ch. 201; *Harris v. Fly*, 7 Paige, 421; *Cato v. Gentry*, 28 Ga. 327; *Turner v. Turner*, 57 Miss. 775.

The question thus far has been the common one, to wit, of the creation of a charge upon land devised. If the same question should arise in regard to Charge upon in- testate land. the same question should arise in regard to intestate land, it would probably be answered in the same way. An heir cannot be deprived in whole or in part of his expectancy in his ancestor's lands without clear words or necessary implication of a gift to another, as we have elsewhere seen.¹

EFFECT OF RESIDUARY CLAUSE.

The effect of a general residuary clause furnishes a striking instance of a rule of construction in aid of an incompletely expressed intention, that is, Failure of dis- position. of an omission by the testator.² It frequently happens, that some express disposition by the testator, in the general disposing part of the will, unexpectedly fails, and hence that no provision in terms relating to such failure is made in the will. For such cases the law declares that a general residuary gift carries not only everything not in terms disposed of, but everything that in the event turns out not to be legally disposed of.³ That is, 'I give all the rest and residue of

¹ Ante, p. 307.

² These, and many other cases, are cases of implication, in a broad sense of that word; but implication is generally used in a narrower if not technical sense, as indicated in the former part of this chapter.

On the question what amounts to a residuary clause, see Striwig's Estate, 169 Penn. St. 61.

³ Jarman, 716; Roy v. Monroe, 47 N. J. Eq. 356, 363, 364; Milwaukee Home for Aged v. Becher, 87 Wis. 409; Smith v. Smith, 141 N. Y. 29, 34; In re Bagot, 1893, 3 Ch. 348. 'The expectations of a testator and his intentions may be two different things. He never expects that any of the dispositions of his will are void, and he rarely expects that any of the devises and bequests will lapse. But when he attempts to dispose of all the property he may own at his death, he

my personalty ' is construed to mean, not merely ' I give such of my personalty as is not herein bequeathed,' but ' I give all my personalty not herein bequeathed, and also all my personalty not herein so bequeathed as to pass to the persons intended as legatees.'

This rule is based upon the idea that the residuary legatee is supposed to be preferred by the testator to every one else except the particular legatees of his will; in other words, the testator is deemed to have given his personalty away from the residuary legatee only for the particular legatees.¹ Hence if the gift to the particular legatees fail for any reason, the residuary legatee must take the benefit as the one next in favor.²

And this rule of construction in favor of the residuary legatee appears to be a firm one. Very special words, it has been declared, are necessary to take a gift of the residue out of the operation of the rule.³ A forcible illustration is shown in a case in which a testator gave to the residuary legatee

Rule strong in
favor of resid-
uary legatee:
void devise.

never intends to die intestate, and he intends that a general residuary clause shall carry whatever as matter of fact or of law is not otherwise disposed of.' Earl, J., in *Smith v. Smith*, supra. Hence the residuary clause often passes what was not intended to pass by it. *Sawyer v. Freeman*, 161 Mass. 543, 548; *Batchelder, Petitioner*, 147 Mass. 465, 468; *In re Bagot*, 1893, 3 Ch. 348.

In the case of a residuary gift the question is, not what is included, but what is excluded. *In re Bagot*, 1893, 3 Ch. 348, 351, 357. Contra of specific gifts. *Id.* p. 351. See *Roy v. Monroe*, 47 N. J. Eq. 356, 364; *Easum v. Appleford*, 5 Mylne & C. 56, 61.

In this country a residuary gift operates to execute a power, unless a contrary intention appears. *Hassam v. Hazen*, 156 Mass. 93. So now by statute, though previously contra, in England. *Id.*

¹ *Crerar v. Williams*, 145 Ill. 625, 641.

² *Cambridge v. Rous*, 8 Ves. 25, Sir Wm. Grant, M. R.; *Crerar v. Williams*, supra.

³ *Bland v. Lamb*, 2 Jac. & W. 406, Lord Eldon; *Carter v. Board of*

all property 'not specifically given' by the will; it was held that this carried *specific* legacies which had lapsed, no sufficient evidence of a contrary intention being shown to overturn the supposed preference of the residuary legatee to the next of kin.¹ And this is well supported by other authority.² Whether the rule that void gifts fall into the residue applies to void devises, under the *statutes*, is not agreed, but the better view is that it does apply to them.³

But the first question still is one of the testator's intention, and hence there may be no place for any rule of construction. If there is clear evidence upon the face of the instrument that the testator did not prefer the residuary legatee to the person who would be entitled in case of intestacy, the construction mentioned cannot be applied;⁴ with the result that the one entitled in intestacy will take the gift, for such person is not to be deprived except by clear and legally manifested intention.

The rule of construction again may be applicable only in part. Such will be the case, according to certain authorities, when the disposition of an alienation of residue of residue fails for any reason; in such a case the part which fails should

Education, 144 N. Y. 621, 624; *Smith v. Smith*, 141 N. Y. 29, 34; *Lamb v. Lamb*, 131 N. Y. 227.

¹ *Roberts v. Cooke*, 16 Ves. 451.

² *Evans v. Jones*, 2 Colly. 516; *James v. Irving*, 10 Beav. 276; *Markham v. Ivatt*, 20 Beav. 579.

³ See *Milwaukee Home for Aged v. Becher*, 87 Wis. 409, 414; 13 Am. & Eng. Enc. Law, p. 40, note 3; post, chapter 27, at end.

⁴ Plainly it is not necessary that the language of the will should actually show a preference for the next of kin or heir at law. Secus, it seems, where the contest is between the residuary legatee and some

not go to the residuary legatee, as a residue of residue, but should devolve as intestate property.¹ A testator gave the residue of his estate to his two daughters, but in the event that either died leaving no children, then out of the share of such daughter he gave a certain sum of money to A, and the remainder of that share to the other daughter. The event having happened, and the testator having revoked the gift of money to A, it was held that such money went, not to the surviving daughter, but as intestate estate.² In another case a testator bequeathed the rest, residue, and remainder of his estate to his sisters and to his brother in equal shares. He afterwards made a codicil, in which he said: 'I revoke my bequest to my brother, as he is not living.' It was held that the share which was to go to the brother went to the testator's next of kin, not to his residuary legatees.³ But it was so held merely upon what was considered binding authority,⁴ and without approval, or rather with disapproval, of the rule itself;⁵ and rightly, it would seem. The argument in favor of the other residuary legatee is quite as strong in this as in the ordinary case.

Whatever be considered the better view, however, the question is one of intention, so far as there is any indi-

legatee not next of kin, as where the will reserves articles not already given, to be disposed of by codicil, and then, in the codicil, fails to give the articles. *Davers v. Dewes*, 3 P. Wm. 40.

¹ *Skrymsher v. Northcote*, 1 Swanst. 566; *Waln's Estate*, 156 Penn. St. 194.

² *Skrymsher v. Northcote*, *supra*. 'Residue means all of which no effectual disposition is made by the will, other than the residuary clause.' Sir Thomas Plumer, M. R. See also *Humble v. Shore*, 7 Hare, 247; *Lightfoot v. Burstall*, 1 Hem. & Mil. 546.

³ *Waln's Appeal*, *supra*.

⁴ *Gray's Estate*, 147 Penn. St. 67.

⁵ 'The English rule, as we said in *Gray's Estate*, 147 Penn. St. 67, does not commend itself to sound reasoning.'

cation of intention in the language of the will. If there is such indication that the testator intended that the lapsed part of the residue should itself be treated as residue, it will be so treated.¹ Doubtless slight indication of such intention would be sufficient.

Another case of an incompletely expressed intention in regard to residue arises where a testator simply names

Appointment of a particular person as his residuary legatee, residuary legatee without declaring of *what* he is such legatee. The courts have met the doubt by the rules defining his estate. following: If the will disposes of personalty

only, the primary sense of the words is not disturbed; the appointment amounts to a gift of the residue of the personalty, and of that only. Thus 'I make A my residuary legatee,' without other words, in a will disposing only of personal property, gives to A the residue of personalty not before disposed of, and that only.² But if the estate disposed of comprises both realty and personalty, then it is held that the residue referred to is the residue of what the testator has already given in part, to wit, his realty and personalty.³

CUMULATIVE GIFTS.

Another rule of construction which may be noticed is that a second gift, in the very same instrument — the same will or the same codicil — is considered, not as an additional or cumulative gift, but as a repetition of or substitute for the one first given, if the second one be of

¹ See *Evans v. Field*, 8 Law J. N. S. 264; *Crawshaw v. Crawshaw*, 14 Ch. D. 817.

² *In re Methuen*, 16 Ch. D. 696, Jessel, M. R.; *Hughes v. Pritchard*, L. R. 6 Ch. 24; *Bragaw v. Bolles*, 51 N. J. Eq. 84, 91, 92.

³ *Hughes v. Pritchard*, *supra*; *Bragaw v. Bolles*, *supra*; *Laing v. Barbour*, 119 Mass. 523. The last named case went to an extreme, in

the same kind or amount. It is as if the testator had said, 'I repeat that I give AB' such a thing or sum. The rule too applies whether the legatee or devisee be the testator's child or grandchild, or any one else.¹ In the case of a child the gift would fall within the presumption against 'double portions,' elsewhere considered.² But in any case the rule yields to evidence of intension inconsistent with it.

Where the gifts are in different instruments, the rule is the opposite of that first stated; the gifts are treated as cumulative unless a different intention is manifested,³ and perhaps but little would be needed to indicate such intention.⁴ So where the sums are different, they are considered cumulative, though they are given in the very same instrument; and the same would be true where they were not ejusdem generis,⁵ or where they are payable at different times,⁶ or where one is an absolute and the other a contingent gift,⁷ or where a different motive is stated for them.⁸

PAYMENT OF DEBT BY LEGACY.

Closely allied to the subject of construction in regard to cumulative legacies there is a doctrine of construction

holding that land acquired after the making of the will passed to the residuary 'legatee.' But the will in terms disposed of property afterwards to be acquired. See *Bragaw v. Bolles*, ut supra, criticising the decision.

¹ See *Suisse v. Lowther*, 2 Hare, 424; *Jones v. Creveling*, 4 Harrison, 127; *Dewitt v. Yates*, 10 Johns. 156.

² Chapter xxviii.

³ *Suisse v. Lowther*, supra.

⁴ See *Benyon v. Benyon*, 17 Ves. 34, 41, 42; *Currie v. Pye*, 17 Ves. 462; *Redfield, Wills*, ii. 181.

⁵ *Ives v. Dodgson*, L. R. 9 Eq. 401.

⁶ *Wray v. Field*, 2 Russ. 257.

⁷ *Hodges v. Peacock*, 3 Ves. 735.

⁸ *Ridges v. Morrison*, 1 Bro. C. C. 389; *Currie v. Pye*, 17 Ves. 462; *Hurst v. Beach*, 5 Madd. 351.

of legacies to creditors. The rule appears to be substantially the same in the two cases; in the absence of controlling evidence of intention, or of statute, a legacy made to a creditor of the testator, equal to or greater than the debt, where the legacy is of the same nature as the debt, where it is certain and not contingent, and where no particular motive is assigned for the gift (unless as payment of the debt) is deemed a satisfaction of the debt.¹ The ground of the rule is, that a testator who is a debtor should be deemed to be just towards others before he is generous to his creditors.

The doctrine is open to criticism, where the testator has means ample for both justice and generosity, and the language of the will is the language of gift and not of payment. The rule, however, is not affected by such facts; still slight indications in other ways may be sufficient to enable the creditor to hold the gift as mere bounty, retaining his claim to payment of the debt in full. Such indications are mentioned in the statement above made of the general rule; the exceptions to which may be put thus:—

The rule does not apply to legacies less than the debt, even as satisfaction *pro tanto*;² nor where there is a difference in the time of payment of the two; nor where the two are of a different nature in the subject-matter or in the interests relating to it;³ nor where a motive inconsistent with the idea of payment is expressed; nor where the debt is contracted after the making of the will; nor where the legacy is contingent or uncertain;⁴ nor where there is an express direction in

¹ Story, Equity, ii. § 1119.

² *Parker v. Coburn*, 10 Allen, 82, 84; *Thynne v. Glengall*, 2 H. L. Cas. 153.

³ *Cloud v. Clinkenbeard*, 8 B. Mon. 397.

⁴ *Dey v. Williams*, 2 Dev. & B. Eq. 66.

the will for payment of debts;¹ nor where the debt consists in a negotiable security;² nor where the debt is upon an open or running account.³ And further exception was formerly made in England, and possibly would still be made in some of our States, where the bequest was of a residue.⁴ There is however no distinction between children of the testator and strangers.⁵

VERGE OF CONSTRUCTION.

The subjects last presented — Cumulative legacies, and Payment by legacy — may well be deemed to carry construction to the very verge of its legitimate function, if construction is to be considered (in this particular) as the filling out by law of an incompletely or imperfectly expressed intention of the testator. To go further would be to leave behind the light of the will altogether.

Construction then ends here.

¹ *Strong v. Williams*, 12 Mass. 391.

² *Carr v. Estabrooks*, 3 Ves. 564.

³ *Rawlins v. Powell*, 1 P. Wms. 229.

⁴ *Graham v. Roseburgh*, 47 Mo. 111. The early English cases to that effect were overruled in *Thynne v. Glengall*, 2 H. L. Cas. 131. See also *Dawson v. Dawson*, L. R. 4 Eq. 504.

⁵ *Tolson v. Collins*, 4 Ves. 483. See for the whole paragraph of the text, Story, Equity, ii. § 1122.

PART IV.

THE EFFICACY OF A WILL.

The Nature and the Construing of a will having been considered, the next inquiry is of the Efficacy of a will, otherwise regarded.

CHAPTER XXIV.

CONVERSION.

THAT one may by will control the devolution of property is of the very essence of the conception of wills; but that one may turn real property into personalty and personal property into realty, without changing the substance of it, and thus cause it to be transmitted (for a time) as if the property had in fact been changed, is not of the essence of a will, or of the nature of a will. If then that can be done, it must be in virtue of some distinct conception of right. That it can be done is one of the familiar things of the law; equity is responsible for the doctrine, and has given it the name of conversion. The doctrine is not confined to wills, but finds in wills its commonest expression.

A will may then convert realty into personalty, and personalty into realty;¹ mere direction, if plainly imperative, to the effect that realty shall be treated as personalty, or personalty as realty, or even that each shall be treated as having the properties of the other, will accomplish the purpose. Money or chattels thus become land, and land becomes money, for administration of the testator's estate, and if the will so provide, for purposes further in the future.² The doctrine appears to be based

¹ This clearly is not construction; it is turning white into black, and black into white, by mere command.

² *Ray v. Monroe*, 47 N. J. Eq. 356; *Howard v. Peary*, 128 Ill. 430; *Perkins v. Coughlin*, 148 Mass. 30; *Underwood v. Curtis*, 127 N. Y.

upon the theory that the distinction between realty and personalty, which appears in the law, is artificial, notwithstanding the difference of fact, and hence that there should be power to disregard the artificial distinction without changing the substance of the property, for the sake of carrying out a perfectly proper desire of the testator.

But to justify the courts in treating property as changed from the character in which the testator (or other) left it, there must be a clearly manifested intention by which the testator has unequivocally fixed upon it throughout a definite character either as personalty or realty.¹ To establish a conversion by will the will must direct the same absolutely, or 'out and out' as the phrase is, for all purposes, and not merely for the purpose of the devise or legacy — for all purposes regardless of contingencies and beyond all discretion. It is not enough to give authority or power to sell and convert; there must be a binding duty to convert, as for instance by a trust for sale.² But when the duty appears, equity will consider that as done which ought to be done, and hence a conversion in law will take place before any conversion in fact; indeed though no conversion in fact is ever made.

523; *Brothers v. Cartwright*, 2 Jones, Eq. 113; *In re Cleveland*, 1893, 3 Ch. 244; *In re Richardson*, 1892, 1 Ch. 379.

¹ See *Hovey v. Dary*, 154 Mass. 7, 12; *Crane v. Bolles*, 49 N. J. Eq. 373, 380.

² *Taylor v. Haskell*, 178 Penn. St. 106, 111; *Fahnestock v. Fahnestock*, 152 Penn. St. 56; *Becker's Estate*, 150 Penn. St. 524; *Howell v. Tomkins*, 42 N. J. Eq. 305; *McDonald v. O'Hara*, 144 N. Y. 566; *Keller v. Osgobury*, 121 N. Y. 362; *Chamberlain v. Taylor*, 105 N. Y. 185; s. c. 43 N. Y. 185; *Mills v. Harris*, 104 N. C. 626; *In re Lahiff*, 86 Cal. 151; *Goodier v. Edmunds*, 1893, 3 Ch. 455; *In re Bird*, 1892, 1 Ch. 279, 283.

Conversion, though presumptively taking place at the time of the testator's death,¹ may have actually taken place during the lifetime of the testator, as where he devises land which he has already agreed to sell. The devisee in such a case will be entitled to the purchase-money.² A contract giving an option to buy real estate already specifically devised is, on the other hand, deemed to work a conversion of the land so as to make nothing but the bare legal title pass to the devisee, while the real interest passes as money to the executor.³ But this is only by presumption; the testator may have manifested a different intent; if he did, it will prevail,⁴ as where, without referring in any way to the contract for sale, he devises the specific property which is the subject of the contract.⁵ This of course supposes that the option to buy was not exercised in the testator's lifetime.

There may be a double conversion so as to leave the property where it was before the will was made. Thus where a testator devises land to be sold and the proceeds invested again in land, the property is to be treated as real estate.⁶

The significance of the doctrine of conversion is seen in the fact that devisees and legatees of property directed to be converted must take it in the character with which it is impressed by the will, with the result that it will then follow, through their hands,

¹ *Underwood v. Curtis*, 127 N. Y. 523, 533.

² *Wright v. Minshall*, 72 Ill. 584.

³ *Cooper v. Cooper*, 21 Ind. 124; *Lawes v. Bennett*, 1 Cox, 167; *In re Pyle*, 1895, 1 Ch. 724.

⁴ *In re Pyle*, supra.

⁵ *Id.*; *Weeding v. Weeding*, 1 Johns. & H. 424. See *Emuss v. Smith*, 2 DeG. & S. 722.

⁶ *Sperling v. Toll*, 1 Ves. 70; *Pearson v. Lane*, 17 Ves. 101. See *in re Pedder*, 5 DeG. M. & G. 890.

the course of devolution applicable to property of that character. Thus where a testator directs that money shall be laid out in land for A in fee, the money, if not laid out as directed, will descend as real estate; it will be subject accordingly to dower and curtesy;¹ it will pass under a devise of lands, tenements, and hereditaments;² it will *not* pass under a bequest of personal estate only.³ So if real estate is devised to be sold, the proceeds being bequeathed to A, and A, surviving the testator, dies before the sale, the property falls to his personal, not to his real, representatives, with the ordinary incidents of personalty.⁴

On the other hand, where property not directed by the will to be converted is converted by order of court, it retains, for the purpose of distribution under the will, the character in which the testator left it. Thus where land devised is sold under an order of court and not by direction of the testator, the proceeds of the sale are treated as real estate.⁵ So when land held in trust under a will is taken for public use by right of eminent domain, the money paid for it stands in its place, subject to the same trust and to the same ultimate destination.

We have seen that to make a case of legal conversion there must be an absolute direction for it. That, however, does not mean that express language must be used; it only means that there can be no conversion unless intention to convert is shown

¹ *Sweetapple v. Bindon*, 2 Vern. 536; *Cunningham v. Moody*, 1 Ves. 174; *Dodson v. Hay*, 3 Bro. C. C. 404.

² *Lingen v. Sowray*, 1 P. W. 172; *Green v. Stephens*, 12 Ves. 419; s. c. 17 Ves. 64.

³ *Gillies v. Longlands*, 4 DeG. & S. 372; *In re Cleveland*, 1893, 3 Ch. 244.

⁴ *Elliott v. Fisher*, 12 Sim. 505.

⁵ *Chapin, Petitioner*, 148 Mass. 588.

with perfect certainty. Now that may be done not only in terms but by necessary implication. If words are used, they must leave no doubt; if words are not used, that is, words directing conversion, there is no conversion unless the case is so plain that no other intention can be supposed. In reality there is no difference between the two cases, terms and implication. The will itself must leave no other course open than to declare that the testator has therein manifested an intention which can be satisfied by nothing but conversion.

It is not enough, it seems, that no other course can be adopted and carry out the provisions of the will, for still there may be no certain intent to convert; No other course that no other course is open is only a fact to ^{open.} be taken into consideration when there is positive indication of the intent. The want of any other course is only negative evidence, whereas there must be positive evidence. When it is said, as it has been, that necessity for conversion is equivalent to a direction for it,¹ the statement, it is conceived, must be taken with that qualification; the 'necessity' must arise from manifested intention, not because no other course is open.

That conversion is not produced merely because some provision of the will must fail without — in other words, though no other course is open for carrying out the will — may be seen from such a case as the following: A testator bequeathed personalty to trustees in trust to invest part of it, at their discretion, either in real estate or in personal securities, and directed that the real estate or the securities should be held subject to certain limitations which could be carried out only by treating the whole fund as real estate. This was held insufficient, by

¹ *Asche v. Asche*, 113 N. Y. 232. See *Neely v. Grantham*, 58 Penn. St. 433.

the highest authority, to create a conversion; there was still lacking any positive evidence of an intention to convert the personalty into realty.¹

The authorities, however, indicate that the fact that the provisions of the will cannot be carried out without considering that the will creates a conversion should not be disregarded, where, aside from that fact, there is evidence on the face of the will that the testator intended conversion. A testator devised fee-simple lands, with limitations to A for life, and various remainders to others. He then bequeathed money to trustees to be laid out in the purchase of lands 'or any other securities,' with limitations in trust which were the same as in the devise of the lands; and some of the limitations could not be carried out if the fund were to be treated as personalty. This fact was taken into consideration, and an intention to convert the personal estate into realty was, on the whole, found to exist, notwithstanding the apparent discretion in the trustees.²

In another case the testator created a trust to lay out moneys 'either in the purchase of lands of inheritance, or at interest, as my trustees shall think most fit and proper, and then upon this further trust, to pay the rents of the said lands of inheritance, or the interest of the moneys' to A for life. Then followed limitations showing that the trust estate comprised lands only; and as before some of these limitations could not be carried out if the trust were to be treated as comprising personalty. It was held, taking the whole will together, that the testator intended that the moneys to be laid out should be

¹ *Evans v. Ball*, 47 Law T. 165 (1890), House of Lords, affirming the decision of the Court of Appeal.

² *Earlom v. Saunders*, Ambl. 241, a leading case before Lord Hardwicke. The effect of the decision was to cut out the words 'or any other securities.' So in other cases of the text.

converted into land.¹ In another case the testator devised fee-simple lands, and bequeathed money upon trust, with consent that it might be invested in buying freehold or *leasehold* lands, which were to be settled to the like uses as the fee-simple lands. It was considered that there was a trust for conversion.²

The application of the doctrine may be difficult, as the foregoing cases indicate, but the doctrine itself appears to be clear. It may perhaps be formally stated as follows: Where a will Rule stated as to foregoing cases. confers power upon executors or trustees to convert real estate into personalty, or personalty into real estate, and it is evident, further, that the testator contemplated that the change must be made for the purpose of carrying the will into effect, and no other way appears for carrying out such object, a conversion is to be regarded as intended.³

The case becomes, of course, much plainer where the courts are not called upon, in declaring that a conversion was intended, to sacrifice any of the language Plain cases of interpretation. of the testator, as they have to do in cases like most of the foregoing. For then it is simply a matter of inferring an intention, unembarrassed with contradiction. Thus a testator directs his trustees to 'invest' in public funds real and personal estate devised to them in trust; this is a direction for converting the land into personalty.⁴

¹ *Cowley v. Hartstonge*, 1 Dowl. 361.

² *Hereford v. Ravenhill*, 5 Beav. 51. See also *Cookson v. Reay*, 5 Beav. 22; s. c. 12 Clark & F. 121; *Simpson v. Ashworth*, 6 Beav. 412.

³ *Fraser v. United Presbyterian Church*, 124 N. Y. 479. See also *Dodge v. Pond*, 23 N. Y. 69; *Dodge v. Williams*, 46 Wis. 70; *Drayton's Appeal*, 61 Penn. St. 172.

⁴ *Affleck v. James*, 17 Sim. 121; *In re Orme*, 25 Ch. D. 595. See also *Cormick v. Pearce*, 7 Harc. 477; *Mower v. Orr*, id. 475; *Burrell v. Baskerfield*, 11 Beav. 525; *In re Cooke*, 4 Ch. D. 454.

On the other hand, it is very clear that the doctrine of conversion will not be applied if the provisions of the will can be carried out without applying it, unless, of course, it still appears that the testator intended a conversion. Thus a testator provided a trust for laying out money in buying land 'or' good securities, for the separate use of a married woman. There was nothing in the nature of the provisions requiring that the money should be treated as land, and hence the ordinary rule prevailed, to wit, that the direction being in the alternative, and hence discretionary, no conversion was demanded. No conversion, in fact, had been made, and the personal representative accordingly took the fund.¹ In a converse case a testator devised land to trustees to be sold, and the produce invested in land 'or' securities. This latter clause was held not to amount to a reconversion into land, for the same reason.²

As conversion is a thing of intention on the part of the testator, it follows that he may determine the time when the change shall take place. If no time is designated for the actual change, so that the sale or other transformation may take place at any time, according to the judgment of the trustees, the conversion takes place at the death of the testator.³ Nor, as we have seen, does it make any difference whether the conversion in fact ever takes place. Thus a trust to sell land within a time named converts the property, though no sale is made within the time.⁴ Nor will a

¹ *Curling v. May*, cited 3 Atk. 255.

² *Van v. Barnett*, 19 Ves. 102. See *Rich v. Whitfield*, L. R. 2 Eq. 583; *Biggs v. Andrews*, 5 Sim. 424; *Walker v. Denne*, 2 Ves. jr. 170.

³ *McClure's Appeal*, 72 Penn. St. 414. The distinction should not be overlooked between a discretion to sell (or otherwise convert) and a discretion only in regard to the time of selling.

⁴ *Tily v. Smith*, 1 Colly. 434.

provision that money be put at interest on personal security until land can be bought prevent its conversion into real estate upon the death of the testator, where there is a positive direction for buying land with the money.¹

But where the will shows that the testator has plainly set a time when, and not before, conversion is to take place, the conversion in law will not take place until that time arrives. Thus where a testator directs his executors or trustees to sell real estate after the death of his widow, and not before, the legal conversion is postponed until the event happens; but when the event does happen, conversion takes place whether a sale is made or not.²

Provisions for conversion are only of a temporary nature in their effect upon the character of the property. As soon as, by descent or purchase, the property reaches the hands of one not bound by the provisions concerning conversion, it ^{Temporary nature of conversions.} puts off its artificial and resumes its natural or actual character. Thus in a case of conversion of real estate into personalty, the character so impressed upon the property will attach to it until it reaches one who, if it had remained real estate, would take it to his own use absolutely, or with power to dispose of it absolutely or make it his own for all purposes, and no longer.³ But

¹ *Edwards v. Warwick*, 2 P. W. 171.

² *Savage v. Burnham*, 17 N. Y. 561, 569. If power only is conferred, no conversion takes place in law until made in fact. In *re Lahiff*, 86 Cal. 151; *Haward v. Peavey*, 128 Ill. 430; *Konvalinka v. Gribel*, 40 N. J. Eq. 443.

³ *Holland v. Adams*, 3 Gray, 188; *Hovey v. Dary*, 154 Mass. 7, 12. 'Notwithstanding the observations of Sir George Jessel in *Chandler v. Pockock*, 15 Ch. D. 491,' said Lindley, L. J., for the court, in *In re Cleveland*, 1893, 3 Ch. 244, 250, 'money which a testator has not got into his own hands, and which is held upon trust for investment in land, is, in our opinion, to be treated as real estate, although, if he has

if the person having such power, being a testator disposing of the property, says nothing to the contrary, the property thus passing by the will must be treated still as converted.¹

Indeed even before the provisions for conversion are satisfied, those who are entitled may take the property in its real character, provided they can do so without disturbing the rights of others under the will.² For it would be vain to insist upon the conversion when, directly after the change, the person entitled could turn it back to its natural state, without affecting the interests of others.³ In such a case then the effect of the will is only to put those interested to an election in regard to the form in which they will take the property. If the provisions for conversion give the converted property to two or more persons, all must of course consent to take it unconverted if it is to be taken so at all; unless they are to take in severalty. In the latter case each may, so far, take his own in its actual character.⁴

More than all this, one who cannot elect to take the property in its actual character where the rights of others would be disturbed, may still, for the purpose of disposing of the property by will, treat it as unconverted. That is, one may dispose of the property by language which describes it in power to dispose of such money, he can dispose of it either as land or money as he may think right.'

¹ In re Cleveland, ut supra.

² *Armstrong v. McKelvey*, 104 N. Y. 175; *McDonald v. O'Hara*, 144 N. Y. 566; *DeVaughn v. McLeroy*, 82 Ga. 687; *Henderson v. Henderson*, 133 Penn. St. 399; *Meek v. Devenish*, 6 Ch. D. 566.

³ *Seeley v. Jago*, 1 P. Wms. 389.

⁴ *Seeley v. Jago*, supra.

its natural or actual character, if one's language plainly indicates an intention that that property shall pass under the particular designation which one gives to it. For while it is true, as has before been said, that property to be converted will not pass by general language inappropriate to it in its artificial character,¹ that merely means that the intention to pass it is not in such a case shown; if the intention is shown, the property will pass, however described. Thus while personalty to be converted into realty will not pass under a bequest of all one's personalty, it may be made to pass, though called personalty, by description sufficient to show that the testator intended that it should pass.²

Such a disposition, however, would not have the effect to alter the character before impressed upon the property, otherwise a devisee or legatee could effectually annul the provisions under which he received the property, without regard to the rights of other persons taking under the same will. Accordingly the property subject to conversion will be held by the second devisee or legatee in the character which the original will impressed upon it.³

There is another kind of conversion of a different nature, to wit, where one form of personalty, as for instance money, is to be converted into another, as for instance government securities. Conversion of this kind is had with a view to the preservation of the fund for the purposes of successive takers under the will;⁴ as where the will gives personalty to A for life, and then to B absolutely. This kind of conversion differs from that above considered in that the character of the property is not changed.

¹ Ante, p. 334.

² *Triquet v. Thornton*, 13 Ves. 345.

³ *Jarman*, 567.

⁴ Of course it may be that the personalty is to be converted into realty, for permanence; but that would be the case already considered.

If the property in question is perishable, it seems that presumptively it ought to be converted into some durable fund, so that the first taker may not consume, exhaust, or unnecessarily impair it, and that the first taker accordingly, if he resists the conversion, has to show why he should have it as the testator left it, in specie as it is called. The question is one of intention on the part of the testator. If the will gives the fund specifically to the first taker, that fact shows ordinarily that the second taker cannot call for a conversion of it; for if the property were to be converted, the first taker could not have it as the testator gave it to him, in specie. Thus under a specific bequest, to A for life and then to B, of 'all stocks and funds standing in' the testator's name, trustees would not be justified in converting long and decreasing annuities, passing under the bequest, into permanent stocks.¹ Still the will might provide that in certain events the property should be converted.

On the other hand, though a bequest be not specific, it may still appear from the will that the testator intended that the first taker should take the property in specie, that is, that there should be no conversion for the sake of the second taker. This may be the case even with a general residuary gift. If in such a case the intention is found in the will, the first taker is to enjoy the property in specie; and the intention may be found either in the residuary clause or in the ulterior gift or elsewhere in the instrument.²

¹ *Lord v. Godfrey*, 4 Mad. 455. See *Boys v. Boys*, 28 Beav. 436; *Hubbard v. Young*, 10 Beav. 203.

² *Jarman*, 578. See also cases *infra*.

What language shows an intention that the first taker shall take in specie, where the direction is not made in terms? The following answers from the ^{Language of} authorities, in particular cases, afford some ^{conversion.} indication: Direction by the testator to renew or keep in repair leasehold property;¹ or to discharge incumbrances upon it;² or to demise it;³ or to convert at a specified time property given under a residuary clause, after a gift to A for life, such direction importing that there is to be no conversion until that time;⁴ or giving a general power of sale;⁵ or power to sail the testator's ships until they can be sold;⁶ or with things clearly to be taken in specie bequeathing other things, the whole to be dealt with together, this affording ground for taking the whole in specie, though not conclusive ground.⁷

More generally, an intention that the first taker shall enjoy the property as it is, has been collected from the fact that the terms of the gift over to the second taker point to the property as it was when the testator had it. A testator gave to his wife for life 'all and every part of my property, in every shape, and without reserve, and in whatever manner it is situated . . . and at her death the property so left to be divided' as then provided. The property consisted in part of leasehold estate. It was

¹ *Crowe v. Crisford*, 17 Beav. 507.

² *In re Sewell's Estate*, L. R. 11 Eq. 80.

³ *Hind v. Selby*, 22 Beav. 373; *Thursby v. Thursby*, L. R. 19 Eq. 395.

⁴ *Alcock v. Sloper*, 2 Mylne & K. 699; *Hunt v. Scott*, 1 DeG. & S. 219.

⁵ *Burton v. Mount*, 2 DeG. & S. 383; *In re Llewellyn*, 29 Beav. 171.

⁶ *Brown v. Gellatly*, L. R. 2 Ch. 751.

⁷ *Bethune v. Kennedy*, 1 Mylne & C. 114; *Burton v. Mount*, *supra*; *Blann v. Bell*, 5 DeG. & S. 658; s. c. 2 DeG. M. & G. 775.

held that the testator intended that the widow should enjoy this for life in specie.¹ In another case a testator gave all the residue of his real and personal estate, 'and all his estate, term, and interest therein' in trust for his wife for life; and after her death he gave 'the same, and all his estate, term, and interest therein' to his son. The wife was deemed entitled to take the property in specie.²

¹ *Collins v. Collins*, 2 Mylne & K. 703. See *Pickering v. Pickering*, 2 Beav. 31; s. c. 4 Mylne & C. 289.

² *Harris v. Payner*, 1 Drew. 174. But see *Lichfield v. Baker*, 2 Beav. 481; s. c. 13 Beav. 447; *Thornton v. Ellis*, 15 Beav. 193.

CHAPTER XXV.

ELECTION.

HE who accepts a benefit under a will must accept the whole of the will; he must accept all of its provisions, favorable or unfavorable; he must renounce all rights inconsistent with it. The Scotch ^{Doctrine stated.} law, which has the same doctrine, puts the case as an epigram; 'one cannot approbate and reprobate.' This is called the doctrine of election. Like conversion, this doctrine does not pertain to the very nature of a will, and hence is not confined to wills; but it does grow out of certain kinds of gift, and finds its commonest expression in wills.

In accordance with this doctrine, a person by accepting a gift under a will which attempts to dispose of property in which he is interested, may be cut off ^{Effect of doctrine.} from his right thereto.¹ Put more specifically, if a testator affect to dispose of property which is not his own, at the same time giving a benefit to the one to whom that property belongs, as sometimes happens, the devisee or legatee, by accepting the benefit so given, elects in law to make good the testator's disposition of his (the devisee's or legatee's) property.² And having

¹ Penn. Life Ins. Co. v. Stokes, 61 Penn. St. 136.

² Syme v. Badger, 92 N. C. 706; Hattersley v. Bissett, 50 N. J. Eq. 577, 582; Hibbs v. Ins. Co. 40 Ohio St. 543; Haack v. Weichen, 118 N. Y. 67; Caulfield v. Sullivan, 85 N. Y. 153; Havens v. Sackett, 15 N. Y. 365; Beem v. Kimberly, 72 Wis. 343; Bolman v. Lohman, 79 Ala. 63; Fitzhugh v. Hubbard, 41 Ark. 64; Batione's Appeal, 136 Penn. St. 307; Bugbee v. Sargent, 23 Maine, 269, 271.

so elected, if he should afterwards refuse to act accordingly and hold his own, equity would sequester the property given to him and make satisfaction out of it to the one whom he has disappointed.¹ Thus a testator, seised of two tracts of land, one on behalf of his eldest son and the other in his own right, devised the first to his second son and the second to his eldest son. The eldest son, after his father's death, entered upon the first (his own) tract; whereupon he was compelled either to give up that tract or to make satisfaction out of the same to his brother.²

It does not affect the application of this doctrine that there is great disparity between the value of the property belonging to the devisee or legatee and that given to him by the testator.³ And the rule holds good at law as well as in equity.⁴ But to make a case in which there must be an election, it must be clear that the testator assumed to dispose of the property of the devisee or legatee and did not intend to dispose of some interest, present or prospective, of his own in the property.⁵

The doctrine applies to contingent as well as vested interests, and to interests reversionary as well as to interests present.⁶ And it applies not only to election to take under the will, but to the converse case, of election to take against the will, — in this sense, that he who elects against the will cannot take under it.⁷

¹ *Batone's Appeal*, supra.

² See *Jarman*, 416; *Anonymous*, *Gilb. Cas. Eq.* 15.

³ *Lee v. Tower*, 73 Ind. 315; *Caulfield v. Sullivan*, 85 N. Y. 153.

⁴ *Watson v. Watson*, 128 Mass. 152.

⁵ *Havens v. Sackett*, 15 N. Y. 365; *Bolman v. Lohman*, 79 Ala. 63.

⁶ *Story's Equity*, ii. § 1095.

⁷ *Cunningham's Estate*, 137 Penn. St. 621.

The devisee or legatee, however, is not precluded from claiming derivatively, through another, property which that other person has taken in opposition to the will. Thus a man may be tenant by the curtesy in respect of an estate in inheritance taken by his wife against the will under which he has accepted a benefit, without affecting his claim to such benefit.¹ For compensation having once been made by the wife by her election, it cannot be exacted a second time. And a devisee or legatee who claims derivatively through another to whom the will gave nothing is equally free; for whether the true owner took subject to an obligation which he has discharged, or subject to no obligation whatever, can make no difference. Thus one coheiress electing to take under a will which disposes of her share, may retain a share which since the testator's death has descended to her from a deceased coheiress, though bound to give up her own original share.²

It makes no difference in the question of the application of the doctrine of election whether the testator knew or did not know that the interest he was disposing of was not his own.³

The true theory, however, upon which the doctrine proceeds is this: The devisee or legatee ought merely to compensate the one to whom the former's Theory of property has been given, in case he elects election. against the will; it is not that he should forfeit the interest which the will gives him as a sort of punishment for refusing to give up his own interest as disposed of by the will.⁴ This at least is the true theory where the case

¹ *Cavan v. Pulteney*, 2 Ves. Jr. 544; 3 Ves. 384.

² *Wilson v. Wilson*, 1 DeG. & S. 152. The foregoing paragraph of the text is from Jarman, 419.

³ Story, Equity, ii. § 1093.

⁴ *Id.*; *Carper v. Crowl*, 149 Ill. 465.

is capable of adjustment by compensation. The result is, that the surplus, if any, after compensation does not devolve upon the heir as a residue not disposed of by the will, but belongs to the electing devisee or legatee.¹

The disappointed donee can therefore never get more than the value of the interest intended for him. But if the estate bequeathed to the electing person is obviously less valuable than that owned by him, equity will decree a conveyance of the estate bequeathed to the first donee or permit the second donee to recover it.²

Election may be enforced against married women and infants, between the inconsistent rights, where there is a clearly manifested intention of the testator that both rights shall not be enjoyed by the devisee or legatee and when it would be against conscience to permit such one to enjoy both.³ The court will elect for infants.⁴

A special case of election, which may conclude this chapter, is a widow's election between taking dower by law out of lands devised by her husband and a bequest or devise by him. At common law, and under statutes in some of the States, so far following the common law, the intention of the testator to compel the widow to elect must be clear. If not made known in express terms, the intention must appear by plain implication from the will, founded upon the ground that the claim of dower would not be consistent with the meaning of the will.⁵

¹ Id.; *Carper v. Crowl*, supra. ² *Lewis v. Lewis*, 13 Penn. St. 79.

³ *Robertson v. Stevens*, 1 Ired. Eq. 247; *Tiernan v. Roland*, 15 Penn. St. 429.

⁴ *McQueen v. McQueen*, 2 Jones, Eq. 16; *Flippin v. Banner*, id. 450; *Story, Equity*, ii. § 1097.

⁵ *In re Blaney*, 73 Iowa, 113; *Hasenritter v. Hasenritter*, 77 Mo.

The will containing the gift to the wife ought then to contain some provision inconsistent with dower, in order to compel the widow to elect; otherwise she may take the gift and retain her dower. That is the common law rule; but the common law on this point has been changed by statute in some States. Thus by the statutes of Massachusetts and of other States, when any provision is made for a widow by will she must elect whether she will have that or dower; she cannot have both unless it plainly appears by the will that the testator so intended. But a provision for the widow in her husband's will does not, under such statutes, affect her claim to one-third of the residue of his personal property, given her by law,¹ or her rights under an antenuptial agreement unless in this latter case a different intention appear in the will.²

162; *Konvalinka v. Schlegel*, 104 N. Y. 125; *Lord v. Lord*, 23 Conn. 327; *Shipman v. Keys*, 127 Ind. 353; *Fulton v. Fulton*, 30 Miss. 586; *Nelson v. Kownslar*, 79 Va. 468; *Parker v. Sowerby*, 4 DeG. M. & G. 321.

¹ *Nickerson v. Bowly*, 8 Met. 424; *Kempton, Appellant*, 23 Pick. 163.

² *Taft v. Taft*. 163 Mass. 467.

CHAPTER XXVI.

EXECUTORY GIFTS.

IF conversion and election are doctrines not arising from or pertaining to the nature of a will, as we have seen that they are not, we come now to a subject peculiar to wills, even if it cannot (as doubtless it cannot) be said to be of the very nature of a will. An executory devise has been permitted to have an efficacy which no other legal act could have, apart from statute; it has cut one of the nerves of feudalism. The standing of the executory devise has been due to the feeling of disfavor of feudal tenure. But for feudalism, one might as well have done by deed what one was permitted to do only by will. Apart from feudalism, there is no reason in sound theory why conveyance *inter vivos* should be restricted where testacy is not. The distinction is becoming obsolete, under legislation giving to conveyance and contract the same exemption from feudal doctrine which wills have always enjoyed.

An executory devise is a limitation by will of a future estate in land, which cannot, according to the rules of the common law, take effect as a remainder; when a devise *can* take effect as a remainder, according to the state of things at the death of the testator, it will be treated as a remainder. Thus the common law prefers remainders to executory devises.¹ What

Executory devise: favor shown to wills: legislation.

Definition and remarks.

¹ *Dean v. Dean*, 1891, 3 Ch. 150, 154.

then is a remainder? must be asked, in order to determine what is an executory devise.

A remainder is an estate in land so limited in the instrument creating it as to be expectant immediately upon the natural determination (i.e. determination by the very terms) of a particular estate of freehold limited by the same instrument. Every devise of a future interest, not preceded by an estate of freehold created by the same will, or which, being so preceded, is limited to take effect before or after, and *not* at the natural determination of such prior particular estate, must then be an executory devise.¹

Accordingly if there be no particular estate before the one in question, or if there be no particular estate of freehold, the estate in question is as much executory as where the limitation of the future estate is such as to cut down the particular estate or as to leave a gap between the particular and the future estate. Thus a testator devises to the unborn children of A, described as unborn or unborn in fact at the testator's death; no disposition being made of the estate until a child of A is born. The estate is executory, and the devise is an executory devise. Again, a testator devises land for a term of years, short or long it matters not, to A, and afterwards to B. The particular estate of A being less than freehold, B has not a remainder; hence he has an estate created by executory devise, or, shortly, he has an executory devise, with the legal consequences peculiar to such an estate.

The following are examples of executory devise with a prior particular estate of freehold: Devise to A for life, but if he shall die under twenty-one, then to B. Here the particular estate of freehold is cut down by the terms

¹ Blackman v. Fysh, 1892, 3 Ch. 209. See Dean v. Dean, 1891, 3 Ch. 150.

of the gift to B. Devise to A for life, and six months thereafter to B. Here the particular estate of freehold is followed by a gap, the future estate not arising upon the natural determination of that estate.

In cases of future interests limited upon particular estates of freehold not cut down, it is necessary that the devise, to be executory, should be such that there *must* be a gap between the particular and the future estate; it is not enough that there is a possible gap. Thus, devise to A for life, and after his death to the unborn children of B. The children of B have a contingent remainder, not an executory devise, for A may live until B has a child. But to leave a necessary gap, however short, even for a day, would make the future interest executory. The difference therefore should be well observed between cases like the example and cases in which the ulterior gift cuts down, though only by possibility, the prior estate of freehold. In the example the freehold cannot be cut down by the event which brings in the ulterior estate.

At common law there could be no such thing as a remainder in personalty; every future legacy of personalty, whether preceded by a partial gift or not, was in its nature executory. A gift for life carried the absolute interest. But a distinction came to be taken between the use and the property, and it was accordingly held that the use might be given to one for life, and the property afterwards to another. Though the gift over of the chattel would be void as a remainder, it was held good as an executory devise. And such is the common law now; the gift of a chattel for life is a gift of the use only, and the remainder over is good as an executory bequest. Such limitation over

is good for every kind of chattel, and there is no distinction between money and any other chattel interest.¹

There is an exception to the rule that a gift of a chattel for life carries only the use and not the res itself in those cases in which the article is of such nature as to be consumed in the use, as in the case of corn, hay, and fruits. Such a gift is in most cases, if specific, a gift of the property absolutely.²

Personal property cannot be given to one in tail, with remainder over, nor can an executory bequest be made to take effect upon the termination of an estate tail, because it is too remote. In most cases in which a gift over has been maintained the gift to the first taker, by the terms of the bequest, has not exceeded a gift for life.³ But that need not be so; there may be an absolute gift to the first taker, with a provision that, upon the death of the absolute legatee before the legacy becomes payable, the gift shall go over to another. Such gift would be perfectly good.⁴

¹ Kent, ii. 352, 353. Hence a bequest of money for life and then over, gives only the interest. *Field v. Hitchcock*, 17 Pick. 182.

² *Stuart v. Walker*, 72 Maine, 145; *German v. German*, 27 Penn. St. 116; *Merrill v. Emery*, 10 Pick. 512. Compare ante, p. 342.

³ *Albee v. Carpenter*, 12 Cush. 387; *Hall v. Priest*, 6 Gray, 18, 22.

⁴ In re Porter, 1892, 3 Ch. 481, 488.

PART V.

THE PREMATURE END OF A WILL.

*The Nature, the Construing, and the Efficacy of a will having been considered, the next and final inquiry is, of the Premature End of a (valid) will.*¹

¹ To treat of the very last things of a will would carry us into matters of administration, beyond the purpose of this book.

CHAPTER XXVII.

LAPSE OF GIFT.

A WILL, in itself perfectly valid, may fail to take effect, in whole or in part. As we have already stated, a will can have no effect until the death of the testator, or rather until it is admitted to probate; nor does it then have any retroactive effect so as to confer rights before the testator's death. The consequence is, that a legatee or devisee who dies in the lifetime of the testator cannot take under his will; so far the will fails, and if that is all there is of it, it fails, of course, entirely.¹ This is fundamental doctrine; no statute has changed it. The term used to express the failure of the gift in such a case is lapse.

The person intended does not take the gift, and hence no one, even under statute, can take through him. The legal doctrine of lapse, in its ordinary sense, thus imports the death or extinction, before the testator's death, of some object of his will. And this object may be the donee of a power,² whether natural person or corporation,³ as well as a legatee or devisee who was to take beneficially.⁴

¹ 'Speaking as of that date, lapsed legacies would be ignored the same as if they had not been made.' Vann, J. in *Moffett v. Elmendorf*, 155 N. Y. 475, 488.

² *Jones v. Southall*, 32 Beav. 31; *Reid v. Reid*, 25 Beav. 469; *Freeland v. Pearson*, L. R. 3 Eq. 658; *Crum v. Bliss*, 47 Conn. 592.

³ *Crum v. Bliss*; *Stratton v. Physio-Medical College*, 149 Mass. 505. See *Hosea v. Jacobs*, 98 Mass. 65, as to change in a religious corporation, after the will.

⁴ 'When a contingency upon which an estate is given over never can take place, such gift over must fail.' Devens, J., in *McGreery v. McGrath*, 152 Mass. 24.

We speak of death or extinction as the 'ordinary' cause of a lapse; other things may produce the same result, as in certain cases of gifts which by natural inference turn upon contingent events, other than death, that may happen to the legatee or devisee. Thus if a testator should give property to an unmarried woman 'as long as she shall remain unmarried,' her marriage, equally with her death, in the lifetime of the testator would cause the gift to lapse.¹ So in the case of a gift to a particular institution as existing, as a matter of substance, if the institution is not in existence at the testator's death, or cannot then take the gift, there is a lapse.²

In the absence of statute this doctrine of lapse would have full play, so that children of the deceased legatee or devisee, living at the time of the testator's death, could not take the gift — for the reason above stated, that the parent could not take. It would apply, too, whether words of limitation, as words marking the duration of an estate are called, were or were not used. Accordingly if the testator devised to A and his heirs, the death of A in the testator's lifetime would cut the heirs off from the gift, because in contemplation of law the whole gift would be intended for A; the term 'heirs' being a term of limitation only, that is, a term defining the estate given to A.³ The same would be true of a gift to A and his heirs and

¹ *Andrew v. Andrew*, 1 Colly. 690.

² *Stratton v. Physio-Medical College*, 149 Mass. 505; *Bullard v. Shirley*, 153 Mass. 559.

³ The student may at first be troubled by the verbal anomaly that the word 'heirs' in such a connection should be called a word of 'limitation,' when there is in law no limitation to an estate to a man and his heirs; but such is the legal nomenclature. 'Limitation' really means extent or duration of the estate.

assigns,¹ though not if the gift were to A and his heirs 'or' assigns, unless indeed it appeared from the context or other parts of the will that 'or' really meant 'and.' If 'or' is to be taken in its natural sense, the assigns will take; they are purchasers, the words 'or assigns' not, in that case, being words of limitation.²

This rule applies, statute apart, as well to legacies as to devises. A strong illustration may be given. A testator makes a legacy to A and his executors or administrators. Now an absolute gift of personalty does not require the addition of the words executors or administrators, and it might seem, accordingly, that the addition of such words indicated an intention that the executors or administrators were to take in case the legatee predeceased the testator. But the contrary is true.³ The same is to be said, a fortiori, of a simple gift to a devisee or legatee who dies in the lifetime of his testator; his heirs or administrators will not take.⁴

But as regards issue of legatees or devisees being of the testator's kindred, the law has been changed by statute very generally, though with some differences. Some of the legislation may be noticed.⁵ A statute of Massachusetts, which Change of law: legislation preventing lapse. has been much copied, provides that in the case of a gift by will of real or personal estate to a child or other relative of the testator, if the donee die before the testator,

¹ *Hand v. Marcy*, 28 N. J. Eq. 59; *Maxwell v. Featherston*, 83 Ind. 339.

² *Hand v. Marcy*, *supra*; *Keniston v. Adams*, 80 Maine, 290; *O'Rourke v. Beard*, 151 Mass. 9; *Gittings v. McDermott*, 2 Mylne & K. 69, 75; *Keay v. Boulton*, 25 Ch. D. 212. For reading 'or' as 'and' see especially *O'Rourke v. Beard*, just cited.

³ *Stone v. Evans*, 2 Atk. 86.

⁴ *Maybank v. Brooks*, 1 Brown, C. C. 318.

⁵ From a note by the author of this work, in *Jarman on Wills*, 307.

leaving issue who survive the testator, such issue shall take the estate so given, in the same manner as the donee would have done if he had survived the testator, unless a different disposition is made or required by the will.¹ The statute of Maine uses the words 'leaving lineal descendants' for 'leaving issue' of the statute just referred to.²

The statute of New York changes the common law where the gift is to a child or descendant of the testator, leaving a descendant who survives the testator; such descendant of a legatee or devisee takes the estate.³ It is provided by statute in Pennsylvania and in Indiana that no devise or legacy in favor of a child or other lineal descendant of the testator shall lapse by his or her death in the lifetime of the testator.⁴ The statute of Georgia provides that legacies shall not lapse if any issue of the legatee be living when the testator dies.⁵

Under the Massachusetts statute above mentioned the donee's issue born before the making of the will does not take, for the testator would have provided for such issue if he had desired.⁶ Probably the same would be true under the other statutes referred to. Of course the surviving parent or husband or wife of the donee would not take,⁷ unless there was evidence in the will of an intention to the contrary.⁸ So also, it seems, of the children

¹ *Sears v. Putnam*, 102 Mass. 5, 10; *Elliot v. Fessenden*, 83 Maine, 197.

² *Morse v. Hayden*, 82 Maine, 227.

³ *Downing v. Marshall*, 23 N. Y. 366.

⁴ See *Woolmer's Estate*, 3 Whart. 477; *West v. West*, 89 Ind. 529.

⁵ *Cheney v. Selman*, 71 Ga. 384.

⁶ *Wilder v. Thayer*, 97 Mass. 439.

⁷ But it has required the action of the courts to settle this. *Morse v. Hayden*, *supra*; *West v. West*, *supra*.

⁸ A gift to 'heirs at law' would show *prima facie* an intent to include a husband or wife, as statutory heir. *Olney v. Lovering*, 167 Mass. 446, 448; *Proctor v. Clark*, 154 Mass. 45; *Lavery v. Egan*, 143 Mass. 389. See *Lawrence v. Crane*, 158 Mass. 392.

of a son-in-law.¹ Under Pennsylvania legislation it is held that the change in the law does not reach the case of a gift to the testator's niece and her heirs; the children of a deceased niece-legatee do not take.²

All this, however, is subject to any intention of the testator at variance with it, expressed in the will; but in the will such intention should be expressed, and legally expressed, or it can have no effect.³ It is not enough that the testator in his will expresses his intention that the gift shall not lapse. To prevent a lapse upon the death of the legatee or devisee, the testator himself should in the will give the property to the person he desires to take it, by substitution, in the event of such death;⁴ a gift is not to be made out of negative words alone. It seems, however, that if, in case of the death of the legatee or devisee, the testator exclude certain of the next of kin, that manifests an intention to give the estate to the rest.⁵ But it is laid down that if the will give the property to some one else in event of the death of the legatee or devisee, to whom, and his executors or administrators, the gift had been made, this indicates an intention to give the interest by substitution to such representatives in the event stated.⁶ The real question in any case of the kind is simply whether the will shows sufficiently an intention in the testator to substitute another in place of the legatee or devisee in the event of such person's death.

¹ *Commonwealth v. Nase*, Ashm. 242.

² *Dickinson v. Purvis*, 8 Serg. & R. 71.

³ See *Comfort v. Mather*, 3 Watts & S. 450.

⁴ *Johnson v. Johnson*, 4 Beav. 318; *Underwood v. Wing*, 4 DeG. M. & G. 633; s. c. 8 H. L. Cas. 183.

⁵ *Lett v. Randall*, 3 Smale & G. 83; *Bund v. Green*, 12 Ch. D. 819.

⁶ *Sibley v. Cooke*, 3 Atk. 572. Further see *Browne v. Hope*, L. R. 14 Eq. 343.

A lapse may result in case of death though the gift be upon a condition or contingency that is not met or does not happen. Thus in case of a gift to A but in a certain event to B, the gift to A lapses by the death of A within the testator's lifetime, whether the event in question does or does not happen, though B should survive the testator.¹ But if the event *does* happen, the gift over to B, surviving, takes effect notwithstanding the lapse.² Again, if A, surviving B, devise an estate to the uses declared by B's will, a devisee under B's will must also survive A to take under A's will.³

When there is a devise or bequest to a plurality of persons as joint tenants in law, no lapse can occur unless all the objects die in the testator's lifetime,⁴ because as joint tenants take 'per my et per tout,' or as it has been expressed, 'each is taker of the whole, but not wholly or solely,' any one of them existing when the will takes effect will be entitled, unless statute has changed the rule, to the whole property. Thus if real estate be devised to A and B, or personal property be bequeathed to A and B, and A die in the testator's lifetime, B, in event of his surviving the testator, will in the absence of statute take the whole.

The same consequence would follow if the gift failed from any other cause; while it is equally clear that if the devisees or legatees in any of these cases had been tenants in common, the failure of the gift as to one object

¹ *McGreery v. McGrath*, 152 Mass. 24; *Humberstone v. Stanton*, 1 Ves. & B. 385.

² *Robinson v. Portland Orphan Asylum*, 123 U. S. 702. There was doubt upon this point formerly. *Id.*

³ *Culsha v. Cheese*, 7 Hare, 245; *Jarman*, 309.

⁴ *Dow v. Doyle*, 103 Mass. 489.

would not have entitled the other to the whole by the mere effect of survivorship.¹ So too where provision is made for the support, in whole or in part, of two persons jointly until the death of both, the death of one of them in the lifetime of the testator obviously will not cause a lapse.²

Gifts to a class of persons to be ascertained at or after the testator's death stand upon a special footing. Such gifts are not gifts to the individual mem- Gifts to a class.bers of the class, as ordinarily are gifts to persons by name or definite description whether as joint tenants or tenants in common;³ and hence the death of members of the class in the testator's lifetime causes no lapse. Thus if property be given simply to the children, or to the brothers and sisters of A, to be divided equally between them, or 'to all my daughters in equal shares,'⁴ the death of any or all but one of those so designated will not bring about a lapse, but the survivor or survivors will take the whole.⁵

The rule is the same where the gift is to the children of a person actually dead at the date of the will, or to the *present* born children of a person; in either of these cases there is this fact to be noticed, that the class is capable of fluctuation only by decrease.⁶ The rule is the

¹ *Sykes v. Sykes*, L. R. 4 Eq. 200; *In re Wood*, 29 Beav. 236. The two foregoing paragraphs of the text are taken from *Jarman*, 310.

² *Dow v. Doyle*, *supra*; *Loring v. Coolidge*, 99 Mass. 191.

³ *Dow v. Doyle*, 103 Mass. 489; *Hooper v. Hooper*, 9 Cush. 122, 130; *Tolbert v. Burns*, 82 Ga. 213; *Crecilius v. Horst*, 78 Mo. 566; *Hall v. Smith*, 61 N. H. 144.

⁴ *Dove v. Johnson*, 141 Mass. 287. But a gift 'to the five daughters of' A is a gift, not to a class, but to persons as if named. *In re Smith*, 9 Ch. D. 117.

⁵ *Doe v. Sheffield*, 13 East, 526; *Shuttleworth v. Greaves*, 4 Mylne & C. 35.

⁶ See *infra*.

same also if, in a gift to the children of a deceased person, the testator in terms includes any child who may die before his death, leaving issue,¹ or if one who would otherwise be a member of the class is an attesting witness,² or if the gift to one is revoked.³

The rule in regard to gifts to a class, above stated, may indeed govern though the gift be to individuals by name, for it may still appear that the testator has treated as a class the persons named.⁴ But ordinarily, as already intimated, there would be a lapse in such cases.

If the class be composed of relatives of the testator, one of whom dies in his lifetime leaving issue, the issue take by statute in most States, as perhaps is to be inferred from what has already been stated.⁵ If no issue is left, the survivors of the class will take the whole.⁶

A gift to executors has been treated as a gift to a class, thus carrying the entire estate to the individuals composing the class, that is, sustaining the office, at the time of the testator's death, though made tenants in common, in exclusion of any who may die before the testator. So a case was treated of a legacy 'to my executors hereinafter named, to enable them to pay my debts, legacies, funeral and testamentary

¹ *In re Coleman*, 4 Ch. D. 165.

² *Fell v. Biddolph*, L. R. 10 C. P. 709.

³ *Shaw v. McMahon*, 4 Dru. & War. 431; *Clark v. Phillips*, 17 Jur. 886.

The text is from *Jarman*, 311.

⁴ *Hall v. Smith*, 61 N. H. 144; *Towne v. Weston*, 132 Mass. 513; *Stedman v. Priest*, 103 Mass. 293; *Collins v. Bergen*, 42 N. J. Eq. 57; *Church v. Church*, 15 R. I. 138; *Webster v. Welton*, 53 Conn. 183.

⁵ *Ante*, p. 359; *Stockbridge, Petitioner*, 145 Mass. 517; *Woolley v. Paxon*, 46 Ohio St. 307. *Contra*, *Gross's Estate*, 10 Barr, 360; *Young v. Robinson*, 11 Gill & J. 328.

⁶ *Dove v. Johnson*, 141 Mass. 287.

charges, and also to recompense them for their trouble, equally between them.' ¹

What has gone before assumes, it will have been noticed, that the persons constituting the class are to be ascertained at or after the testator's death. But the law is probably the same where they are to be ascertained by some event or at some period which has come to pass in his lifetime. Formerly it was considered that such a circumstance altered the case and put it upon the footing of a gift to individuals, so that the death of one would cause a lapse of his share.² But the present doctrine appears to repudiate the distinction and to treat the case still as one properly of a gift to a class, whose members accordingly take the whole gift upon the death of one or more in the testator's lifetime, as in the ordinary case above considered.³

Thus a testatrix gave an estate to A for life, and after his death to his children then living, equally, and A died in the lifetime of the testatrix, leaving three children surviving, one of whom afterwards died before the testatrix. It was held that the children living at the death of A, and surviving the testatrix, were to be considered as a class, and therefore that there was no lapse of the shares of those who had died.⁴ In other words, the rule which prevents a lapse in the case of a gift to a class does not require that the class shall be liable to increase;

¹ Knight v. Gould, 2 Mylne & K. 295; Jarman, 312, where it is said: 'The case turned on the special terms of the will.' And see Barber v. Barber, 3 Mylne & C. 688.

² Allen v. Callow, 3 Ves. 289.

³ Lee v. Pain, 4 Hare, 250; Leigh v. Leigh, 17 Beav. 605; Cruse v. Howell, 4 Drew. 215.

⁴ Lee v. Pain, *supra*.

enough that by the event (as above by the death of A, the father) it could only decrease.

In the case of a gift to one's children, or heirs or issue as children, after a gift to the parent, it may or may not be necessary to consider whether the gift is

Gifts original and substitu- tional.	original, that is, independent, or substitutional upon the failure of the parent to take.
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Where the gift to the children, or heirs or issue as children, is original, the children need not survive the parent, but where it is substitutional they must, in the absence of evidence of a different intention in the will. But it is not necessary, by the better view, in either case that the children should survive the period of distribution.¹ A testator bequeathed moneys to be divided among his children from time to time, and then provided that the issue of any child 'who may hereafter decease shall receive the share or portion to which their parents would be entitled if living.' It was held, that upon the death of a parent before the time when he or she was to receive the gift, his or her issue were to take, by substitution, the share of the parent, and that too though the issue might not survive the time of distribution. That is, the gift over to the issue would not lapse by their death before the moneys were to be paid.²

What happens at common law in the case of a lapsed devise is, as we have elsewhere seen, that the estate then

¹ *Lamphier v. Buck*, 2 Dru. & Sm. 384; *In re Merrick*, L. R. 1 Eq. 551 (Wood, V. C., correcting his statement in *Crause v. Cooper*, 1 Johns. & H. 207); *Crane v. Bolles*, 49 N. J. Eq. 373, 382.

² *Crane v. Bolles*, 49 N. J. Eq. 373. The effect is, that children are not subject to the contingency to which their parents the prior donees are; the parents must survive the period of distribution, in order to take. *Id.* p. 383; *Lamphier v. Buck*, 2 Dru. & Sm. 484; *ante*, p. 293.

falls to the testator's heir.¹ If the lapsed interest be only a legal estate, with the beneficiary estate in another, the heir holds in trust for such beneficiary.² So, on the other hand, if the beneficiary interest in the devise lapses, the heir will take the legal estate in trust for those entitled in virtue of the lapse.³ Statute in many States has directly or indirectly changed this, giving the lapsed devise to the residuary devisee, if any there be.⁴ Lapsed legacies fall into the residue; that is, they go to the residuary legatee, if there be one; if there be none, then to the statutory heirs at law, commonly called next of kin.⁵

A lapsed gift, finally, should be distinguished from a void gift. A lapsed gift is good at the time of the execution of the will; only the death of the object of it, in the lifetime of the testator, defeats the gift. A void gift, however, as in the case of an invalid bequest to a charity, is nothing from the outset; the case is as if there were, so far, an intestacy, and the interest will pass according to the

¹ See ante, p. 322.

² *Cruikshank v. Home for Friendless*, 113 N. Y. 337; *Thomas v. Thomas*, 108 Ind. 576; *Collins v. Collins*, 126 Ind. 559; *Price v. Maxwell*, 28 Penn. St. 23; *Hayden v. Stoughton*, 5 Pick. 528.

³ *Doe v. Edlin*, 4 Ad. & E. 582.

⁴ *Prescott v. Prescott*, 7 Met. 146 (explaining the statutory change); *Lovering v. Lovering*, 128 Mass. 97; *Church v. Church*, 15 R. I. 138; *Van Cortlandt v. Kip*, 1 Hill, 596; *Holbrook v. McCleary*, 81 Ind. 167; *Saunders v. Saunders*, 108 N. C. 327.

⁵ *In re Benson*, 96 N. Y. 499; *Batchelder*, Petitioner, 147 Mass. 465; *Mabrey v. Stafford*, 88 N. C. 602; *Ward v. Dodd*, 41 N. J. Eq. 414; *Church v. Church*, 15 R. I. 138.

‘While the words “after the payment of the foregoing bequests,” in the residuary clause, might in some cases be deemed to circumscribe and confine the residue, so that a residuary legatee would not be entitled to any benefit accruing from lapses, that effect would be given

intestate laws, unless statute has changed its course and given it to the residuary legatee or devisee.¹

to them because they would illustrate an intention which was apparent from the will.' Gray, J., in *Carter v. Board of Education*, 144 N. Y. 621, 624, explaining remarks of Earle, J., in *In re Benson*, *supra*. See also *Ricker v. Cornwell*, 113 N. Y. 115. The leaning of the courts is towards a broad construction, which will prevent intestacy. *Carter v. Board of Education*, *supra*; *Lamb v. Lamb*, 131 N. Y. 227. See *Smith v. Smith*, 141 N. Y. 29, 34.

¹ See *Prescott v. Prescott*, 7 Met. 146.

CHAPTER XXVIII.

SATISFACTION OF GIFT.

FINALLY, a will may come to an end,¹ in whole or in part, by satisfaction of its dispositions afterwards made by the testator himself. Satisfaction may ^{Subsequent} be made either in express terms of inten- ^{acts of testator.} tion, or in virtue of certain acts without expression of any intention to satisfy. Cases of express intention to satisfy need not be considered; what acts of the testator, done after the making of the will, will work a satisfaction of the dispositions of the instrument? The question, it will be seen, is not what the dispositions of a will satisfy, but what satisfies the dispositions; it is not what the will does, but what the testator does after making the will. The question therefore is not one of construction of the will, but of construction of an act in no respect testamentary. It may then well be kept separate from matters of construction of the will, with which, however, it is generally treated. If it be true, as by mere authority it is, that a loan of \$1000 by a father to his son is to be considered paid, in the absence of evidence of intention to the contrary, by a subsequent legacy of \$1000 by the son to the father, still it does not necessarily follow that a legacy of \$1000 by the father to the son, is paid by a subsequent gift of \$1000 by the

¹ Revocation (the ordinary means of putting an end to a will), involving the very nature of a will, has already been considered. See chapter xii.

father to the son.¹ If the legacy is paid by the subsequent gift, the result is due as before to authority, and is not a necessary consequence of the other doctrine.

What follows is to be taken as the law of the subject apart from any statutory change.

It is certainly true (apart from statute) that a subsequent gift by a testator may satisfy a legacy or a devise, without any expression of intention by the giver that it shall. Thus if a father by will were to give \$1000 to his son or daughter, and afterwards should give to him or her in hand the same amount of money, the subsequent gift would satisfy the legacy.² This of course would not be true in the face of an expression of intention at variance with it; the result is simply the expression of a rule of law analogous to rules of construction already considered.³ The rule is often expressed in the form of a presumption against double portions to children and grandchildren.

¹ If the legacy is subsequent to the gift, the gift is not to be taken in reduction of the legacy, unless it was received with the understanding that it should be. *Jaques v. Swasey*, 153 Mass. 596; *Rogers v. French*, 19 Ga. 316, 322; *Yundt's Appeal*, 13 Penn. St. 575; *Taylor v. Cartwright*, L. R. 14 Eq. 167, 176.

² See *Clark v. Jetton*, 5 Sneed, 229; *Rogers v. French*, 19 Ga. 316; *Duckworth v. Butler*, 31 Ala. 164; *Swoope's Appeal*, 27 Penn. St. 58; *Jaques v. Swasey*, 153 Mass. 596, 567; also the following example from the Roman law (to which probably the judges of the English law first looked). 'Filia legatorum non habet actionem si ea quæ ei in testamento reliquit, vivus pater postea in dotem dederit.' Cod. 6, 37, l. 11.

³ Like those rules, this rule is commonly put upon the ground of presumed intention, a most artificial fiction, as will be seen. It seems better to put the case as a rule of law, applied in the absence of evidence of intention to the contrary. But the burden is upon the legatee claiming his legacy, whichever way the case is put.

But the rule, which is also called the rule of ademption, is not confined to plain cases; it goes much further; it goes, indeed, to a questionable point. It ^{Extent of the rule.} appears to be laid down broadly that where a parent gives a legacy to his child or grandchild, the gift is treated as a 'portion' or provision for the child, as due by a sort of debt of nature — in plain language it is the recognition of a debt, or something in the nature of a debt, for that is the legal meaning of 'portion;' and then if the parent afterwards makes a like gift to the child, that subsequent gift may be treated as payment, in whole or in part, by way of advancement of the portion or provision of the will, if no intention inconsistent with the idea is manifested.

Precisely put, the rule is as follows: If the gift so received be equal to or exceed the amount of the legacy, if it be certain and not contingent, if no other distinct object be pointed out, and if it be ejusdem generis,¹ then it will be deemed a satisfaction or an ademption of the legacy. If the later gift be less than the amount of the legacy, and otherwise within the principle of ademption, it will, in England at least, be a satisfaction pro tanto;² and if the difference in amount be slight, it may still be deemed a complete satisfaction.³ The doctrine is gilded over with the statement that the courts 'are not to weigh in golden scales the provisions made,' in order to avoid ademption.⁴ In some of the early cases, indeed, the doctrine of complete ademption appears to have been applied where the difference was very great, upon the

¹ A subsequent gift of land by the testator to his son and legatee is no ademption of the legacy. *Swoope's Appeal*, 27 Penn. St. 58; *Dugan v. Hollins*, 4 Md. Ch. 139.

² *Pym v. Lockyer*, 5 Mylne & C. 29.

³ *Story, Equity*, ii. § 1111.

⁴ *Wharton v. Durham*, 3 Mylne & K. 479, Lord Brougham.

true statement but fallacious reasoning that the father himself may decide the question of ademption.¹

Nor is the rule limited to the gifts of parents; it applies equally to the gifts of a person standing in loco parentis, Gifts of person in loco parentis. that is, to persons meaning to put themselves in loco parentis — in the situation of the person described as the father of the child. And one *may* sustain that relation though the real parent of the child be living at the time, and the child living with and supported by the real parent according to his means.² ‘A rich unmarried uncle, taking under his protection the family of a brother who has not the means of adequately providing for them, and furnishing, through their father, to the children the means of their maintenance and education, may surely be said to put himself, for the purpose in question, in loco parentis to the children, although they never leave their father’s roof.’³

The doctrine however that the legacy is a portion due like a debt, instead of mere bounty as it would be were The doctrine much criticised. the beneficiary a stranger, and the subsequent gift therefore a payment, has been much criticised. It has well been called ‘artificial.’ ‘By a sort of artificial rule’ ‘legitimate children have been very harshly treated upon an artificial notion that the father is paying a debt of nature.’⁴ The criticism becomes caustic when it is supposed that a legacy may be adeemed by a much smaller sum, on the ground that the father is the judge. ‘Although at the time of making the will, he thought he could not discharge that debt’

¹ See the criticism by Lord Eldon in *Ex parte Pye*, 18 Ves. 151. But those cases were overturned by *Pym v. Lockyer*, 5 Mylne & C. 29.

² *Powys v. Mansfield*, 3 Mylne & C. 359, reversing 6 Sim. 528.

³ *Id.*, Lord Cottenham.

⁴ Lord Eldon, in *Ex parte Pye*, 18 Ves. 151.

of nature 'with less than £10,000, yet, by a change of his circumstances and of his sentiments upon moral obligation it may be satisfied by the advance of £5000.'¹

The consequence is, that while the general doctrine itself is admitted, every opportunity has been sought to limit its application.² It was formerly held in England, and there is perhaps authority still in this country for the proposition, that the doctrine of ademption does not apply to the case of a devisee of a mere residue, because, it is said, a residue is always changing; it may amount to something or come to nothing.³ But the earlier English cases have been overturned, and it is now held that a gift of residue is adeemed or not by subsequent portions, as in other cases; the question does not turn upon the mere uncertainty of the amount of the residue.⁴ Small sums however given by the testator to the legatee are not taken against the gift.⁵

The rule of ademption, however, applies only to legitimate children of the parent, and legitimate children of the one who is the real parent in cases of gifts by one standing in loco parentis; unless in the latter case the party has voluntarily placed himself in loco parentis to a legatee not standing in such character. All others are strangers to the testator; and to strangers no such rule applies, except

¹ Id. Lord Eldon, in *Ex parte Pye*, 18 Ves. 151.

² See *Smith v. Smith*, 1 Allen, 129; *Van Riper v. Van Riper*, 1 Green, Ch. 1; *Gilliam v. Brown*, 43 Miss. 641.

³ Story, Equity, ii. § 1115, and cases cited.

⁴ *Thynne v. Glengall*, 2 H. L. Cas. 131; *Dawson v. Dawson*, L. R. 4 Eq. 504. But see *Graham v. Roseburgh*, 47 Mo. 111.

⁵ *Watson v. Watson*, 33 Beav. 574; *In re Peacock*, L. R. 14 Eq. 236; *Leighton v. Leighton*, L. R. 18 Eq. 459.

The doctrine avoided if possible: Residue.

It applies only to legitimate children.

under peculiar circumstances, as where the legacy is given for a particular purpose, and the subsequent gift by the testator is for the same purpose exactly and none other.¹ Towards strangers the testator owes no 'debt of nature;' and hence towards such persons a testator's gifts will not be disturbed by treating them as payments.²

If a thing specifically bequeathed or devised be given to the legatee or devisee by the testator, by act taking effect in his lifetime, there is of course an end of question;³ the legacy or devise is fully satisfied — it has nothing to act upon, any more than if the property were sold by the testator to a third person.⁴

Specific legacies and devises.

¹ Story, Equity, ii. § 1117; *Parkhurst v. Howell*, L. R. 6 Ch. 136.

² Story well says: 'That this reasoning is extremely unsatisfactory, as well as artificial, may be unhesitatingly pronounced. It leads to this extraordinary conclusion, that a testator in intendment of law means to be more bountiful to strangers than to his own children; that by a legacy to his children he means not to gratify his feelings or affections, but merely to perform a duty; but that by a legacy to strangers he means to gratify his feelings, affections, or caprices, without the slightest reference to duty.' Equity, ii. § 1118.

³ *Clayton v. Akin*, 38 Ga. 320.

⁴ *Harvard Society v. Tufts*, 151 Mass. 76, sale by testatrix of 'ten shares of the stock' of a certain corporation. This, too, is called ademption of the legacy (*id.*), though it is practically a revocation of the will, *pro tanto*. See ante, pp. 132-134.

TERMS DEFINED.

[Not defined in the text.]

Adeemption, satisfaction by the testator himself of a gift in his will. Verb, to adeem or satisfy. See pp. 370-374.

Bequest, a testamentary gift of personalty or realty, but more commonly applied to personalty. Verb, to bequeath.

Devise, a testamentary gift of realty. Verb, to devise or bequeath.

Legacy, a testamentary gift of personalty. Verb, to bequeath.

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
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